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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(d)(2) empowers a federal habeas corpus court to refuse to apply the § 2254(e)(1) presumption of correctness for state-court factual findings because the state court did not "mention" certain evidence in making its fact determinations rather than because "clear and convincing evidence" disproved them.

2. Whether § 2254 allows the federal habeas corpus court to re-weigh the evidence from the state-court record and reject state-court factual findings that were based upon the state judge's determination of the credibility of witnesses.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Thomas Maddox, Warden of Corcoran State Prison in Corcoran, California, petitions this Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief to respondent Leif Taylor, a state prisoner, in this case.

OPINION BELOW

The Ninth Circuit opinion is published as *Taylor* v. *Maddox,* 366 F.3d 992 (9th Cir. 2004), and is reproduced in the appendix to this petition. The judgment of the district court denying relief, the report of the federal magistrate recommending denial, and the opinion of the California Court of Appeal affirming Taylor's criminal conviction on direct appeal are also reproduced in the appendix.

STATEMENT OF JURISDICTION

The Ninth Circuit opinion was filed on May 10, 2004, and rehearing was denied on June 16, 2004. This petition, filed

within ninety days of the denial of rehearing, is therefore proper and timely under 28 U.S.C. § 1254 and Supreme Court Rule 13.

The Ninth Circuit issued its mandate "forthwith" upon the denial of rehearing on June 16, 2004, without affording the Warden the normal opportunity under Rule 41 of the Federal Rules of Appellate Procedure to seek a stay of the mandate pending a certiorari petition. On July 9, 2004, the Circuit denied the Warden's motion to recall and stay the mandate. The Warden filed an application with Justice O'Connor to recall the mandate and to stay the Ninth Circuit judgment. On July 13, Justice O'Connor issued an order recalling and temporarily staying the mandate; but, on July 21, Justice O'Connor vacated that stay and denied the Warden's application.

STATUTORY PROVISIONS

28 U.S.C. § 2254 provides, in part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In 1994, respondent Taylor was charged in state court with robbery and murder. The charges were based on evidence that he had shot and killed a young man from whom he had stolen a bicycle.

Prior to his trial, Taylor moved to suppress evidence of his tape-recorded confession to the police on grounds that it had been involuntary and illegally-obtained in violation of *Miranda* v. *Arizona*. The sixteen-year-old testified that he was tired and afraid during the middle-of-the-night interrogation at the police station; that the detectives did not effectively inform him of his *Miranda* rights; that he had asked to see his mother and a lawyer, but that the detectives had told him that he could use the phone only after he had talked with them; that, by drawing a series of long and short lines on paper, the detectives had indicated that his prison sentence would be longer if he refused to talk; that one of the detectives had thrust a ring, bearing a numerical reference to the penal code provision for murder, toward him in a threatening manner; and that in the end he had falsely acknowledged his *Miranda* waiver and falsely confessed, in a tape recording, just so he could put an end to the interrogation and call his lawyer. Arthur Close, a lawyer and friend of Taylor, testified that Taylor had telephoned him immediately after the confession and, at that time, had offered him an account of events that generally tracked, but sometimes went beyond, the version Taylor gave in his suppression-motion testimony. (Appendix A44-A49.)

In contrast, one of the two interrogating police officers, Detective Craig Remine, testified that they had advised Taylor of his *Miranda* rights both orally and in writing; that Taylor had waived his *Miranda* rights in writing at the beginning of the interrogation; that Taylor had not asked to see a lawyer or to see his mother; that, prior to the taped waiver and confession, Taylor had not asked to use the phone; that the detective had never told Taylor he could not leave or make a phone call until

he told the police what they wanted to know; that he did not recall Taylor crying during the interview; that his partner had not pointed the ring at Taylor; that, as far as Remine recalled, the officers merely had taken notes and had not drawn lines on any paper; and that he had never told Taylor that things "would go easier" if he confessed and had never promised him anything or threatened him in any way. One or the other of the detectives was present throughout the interview, and both were present together during "the bulk of the time." (Appendix G; Excerpts of Record [E.R.], *Taylor* v. *Maddox*, CA9 Case No. 02-55560.)

After hearing the testimony, observing counsels' presentation of the written *Miranda* form to the witnesses, and listening to the *Miranda* portion of the tape-recording, the trial judge stated: "I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer R[e]mine and not the testimony of the defendant in this case." The judge later repeated that the defense case was "made *primarily* by the testimony of a witness I do not credit in this case [emphasis added]." Accordingly, the judge ruled that the confession was voluntary and that no *Miranda* violation had occurred: "I find there was no violation of *Miranda*, the *Miranda* rights were given ahead of time, when they have been given before incriminating statements were given. I find it is voluntary under the case law." The judge therefore "decline[d] to suppress the statements that were given to the officer in this case." (E.R. 68-69; Appendix G.)

2. In 1996, the California Court of Appeal upheld the trial judge's ruling and affirmed Taylor's conviction. The appellate court noted that Detective Remine had "testified to facts which, if believed, showed the waiver was knowingly and intelligently given and the confession was voluntary." It then explained that "[d]efendant's contrary testimony is not grounds for reversal" in light of the trial judge's findings on the credibility of the evidence. (Appendix F7-F8 [State Appellate Court Opinion].) The California Supreme Court denied further discretionary review.

3. In 1997, Taylor filed a federal habeas corpus petition, re-asserting his constitutional challenges to the evidence of his confession. The district judge, adopting the report and recommendation of a federal magistrate, rejected the challenge and dismissed the petition in 2001. (Appendix B [Magistrate's Report], C, D [Order and Judgment].)

4. In a published opinion, the Ninth Circuit reversed the district court. The panel determined that, in light of the trial judge's failure to "mention" what it deemed to be the important testimony of Taylor's acquaintance Close, the state court's factual findings were "unreasonable" under 28 U.S.C. § 2254(d)(2) and therefore were not entitled to the presumption of correctness for state factual determinations prescribed by § 2254(e)(1). (Appendix A25-A26.) Then, undertaking its own de novo fact-finding, assertedly under a "clear and convincing evidence" standard of review, the panel credited Taylor's version of the events surrounding the interrogation over that of the police officer. (*Id.*, A26-A37.) In doing so, the Ninth Circuit emphasized the hearsay testimony of attorney Close and considered evidence that had not been before the state court at the time it ruled on the suppression motion. (*Id.*, A28, A41.) On the basis of its appellate findings, the Ninth Circuit held that Taylor's incriminating statements were involuntary and that they also had been obtained in violation of *Miranda*. (*Id.*, A37-A38.) Finding those errors prejudicial (*id.*, A39-A42), the panel directed the district court to issue a conditional writ requiring Taylor's release from prison unless the State within 30 days from the panel's mandate agreed to forgo the evidence of Taylor's confession in a re-trial. (*Id.*, A42-A43.)

5. The Warden filed a timely petition for rehearing and a suggestion for hearing en banc. The Warden argued that the panel had erroneously construed § 2254 in refusing to accord deference to the state court rulings, and that the panel's re-determination of the facts in Taylor's favor was improper under Supreme Court presumption-of-correctness precedents. On June 16, 2004, the Ninth Circuit denied the Warden's

rehearing petition and issued its mandate "forthwith." (Appendix E.)

6. On July 13, 2004, Justice O'Connor issued an order recalling and temporarily staying the mandate. But, on July 21, Justice O'Connor vacated that stay and denied the Warden's application. The federal district court issued the writ of habeas corpus on July 26. The Warden is informed that preliminary State-court proceedings related to Taylor's re-trial are imminent.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO SETTLE IMPORTANT QUESTIONS CONCERNING THE RELATIONSHIP BETWEEN 28 U.S.C. § 2254(D)(2) AND §2254(E)(1) AND TO CORRECT THE NINTH CIRCUIT'S FAILURE TO FOLLOW THIS COURT'S AEDPA AND HABEAS CORPUS PRECEDENTS

As amended in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) both prescribe standards relating to review of state-court determinations of factual issues. This Court should grant certiorari in this case to settle important questions concerning the relationship between the operation of these two provisions. Certiorari is warranted, also, because the Ninth Circuit's decision conflicts with this Court's jurisprudence with respect to whether State court opinions must specifically discuss certain aspects of the case in order to be entitled to deferential review under the AEDPA and with respect to whether federal courts may re-weigh conflicting testimony from a state evidentiary hearing and overrule the State court's credibility determinations.

A. Question One

The first question presented in this petition is whether § 2254(d)(2) authorizes a federal habeas corpus court to refuse to

apply the § 2254(e)(1) presumption of correctness for state-court factual determinations because of the manner in which the state court explains its decision rather than because of the strength of the underlying evidence. This question is one of national importance, going to the core of the fundamental changes in the scope of federal habeas corpus review of state criminal judgments wrought by Congress in AEDPA. The Ninth Circuit's construction of AEDPA's reform of the habeas corpus statute, 28 U.S.C. § 2254, is inconsistent with this Court's explanations of how that statute works. And it conflicts with the constructions of § 2254 endorsed by at least one other circuit court of appeals.

1. Section 2254(e)(1), as amended by AEDPA, provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Under this plain language, application of the presumption of correctness seems to be unconditional; and the sole and limited means of overcoming the presumption appears to be explicitly prescribed. Indeed, in this regard, AEDPA amended the predecessor version of the statutory presumption, former § 2254(d), by entirely deleting what had been a list of eight conditions to the presumption's operation. (Cf. [Former] § 2254(d) (1995) (presumption subject to prerequisites such as "adequate" state procedures, "full and fair hearing" in state court, federal court satisfaction that determination was "fairly supported" by the state court record," provision of counsel in state fact-finding hearing, etc.).[1/]

It would seem strange, to say the least, if factual findings "presumed to be correct" under (e)(1) in the absence of clear and convincing evidence disproving them could nevertheless be rejected under (d)(2) as "unreasonable" in light of "the evidence presented in the State court." Cf. *Wiggins* v. *Smith*, 123 S. Ct.

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1. The full text of the presumption-of-correctness provision of former § 2254(d) is reproduced in Appendix H to this petition.

2527, 2539 (2003) (fact determination that documents contained certain information unreasonable and disproved by clear and convincing evidence where state conceded that documents in fact did not contain the data). To draw that conclusion opposite would in effect read the presumption out of the AEDPA scheme. And such a conclusion would appear inconsistent with this Court's admonition that the AEDPA's provisions on habeas corpus relief should be construed to give them meaning rather than render any of them a nullity. *Williams* v. *Taylor*, 529 U.S. 362, 403-404, 407 (2000). It would further appear untenable to conclude that Congress chose the improbable "Delphic" path of stripping the prior statutory presumption-of-correctness provision of its many pre-conditions as a roundabout way of maintaining the status quo. Cf. *Lindh* v. *Murphy*, 521 U.S. 320, 332-333 (1997).

The Ninth Circuit, however, concluded that the § 2254(e)(1) presumption was inapplicable to the state court's fact-finding in this case because, in the appellate panel's view, the state court's determination of the facts had been "unreasonable" under § 2254(d)—a different provision that precludes habeas corpus entirely on claims adjudicated on their merits in state court unless, inter alia, the state adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. See § 2254(d)(2). The Ninth Circuit thus employed AEDPA's fundamental, habeas-restricting provision of § 2254(d) as a device for nullifying the operation of what otherwise would be a strengthened, unconditional AEDPA presumption-of-correctness in § 2254(e).

These AEDPA provisions for deferential review of state-court judgments work as the very heart of Congress' habeas corpus reforms. The Ninth Circuit's problematic—indeed, erroneous—construction of those basic provisions presents a question of importance meriting this Court's consideration.

Because of the importance of deferential review under AEDPA, the State of California has also filed a certiorari petition in *Mueller* v. *Nunes*, No. 03-1452, on a closely-related question—whether a state-court "evidentiary hearing" is a pre-condition to the operation of the (e)(1) presumption of correctness for state-court fact-finding—that overlaps the question presented in the case at bar. On June 14, 2004, this Court ordered the respondent in the *Nunes* case to file a brief in opposition to the State's petition.

2. The Ninth Circuit's construction of (d)(2) and (e)(1), moreover, conflicts with what this Court has said about the operation of those provisions. In *Miller-el* v. *Cockrell*, 123 S. Ct. 1029, 1042 (2003), this Court explained that (d)(2) and (e)(1) represent "independent" requirements, the former pertaining to the availability of relief in light of the state court's ultimate "decision" on the merits of claim and the latter pertaining instead to discrete state-court determinations of factual issues. And, in both *Miller-el,* 123 S. Ct. at 1041, 1045, and *Wiggins* v. *Smith*, 123 S. Ct. at 2539, 2540, this Court repeatedly explained that, to prevail, a petitioner must demonstrate both that the state-court's fact finding was incorrect by clear and convincing evidence under (e)(1) and that the state court's judgment rested on a fact determination that was unreasonable in light of the evidence under (d)(2). Rather than recognizing these provisions as hurdles for the prisoner to overcome, the Ninth Circuit treated (d)(2) as an obstacle to the State's reliance on the protection of the (e)(1) presumption.

3. In addition, in employing (d)(2) to read pre-conditions back into the (e)(1) presumption, the Ninth Circuit's construction on AEDPA conflicts with that of the Fifth Circuit in *Valdez* v. *Cockrell*, 274 F.3d 941, 950-951 & n.17 (5th Cir. 2001), cert. denied, 537 U.S. 883 (2002). In *Valdez*, the Fifth Circuit deemed "untenable" the view that Congress' deletion of the conditions in former § 2254(d) had been ineffective, and refused to interpret (d)(2) as re-imposing the old "full and fair hearing" pre-requisite on the (e)(1) fact-finding presumption.

Accord, *Morrow* v. *Dretke*, 367 F.3d 309, 315 (5th Cir. 2004). The Seventh Circuit view accords with that of the Fifth Circuit. See *Mendiola* v. *Schomig*, 224 F.3d 589, 592 (7th Cir. 2000), cert. denied, 533 U.S. 949 (2001). Other judges and commentators, also, have perceived uncertainty surrounding the question of how (d)(2) and (e)(1) operate together. See, e.g., *Channer* v. *Brooks*, 320 F.3d 188, 194 (4th Cir. 2004); *Green* v. *White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000); 17A Wright et al., Federal Practice and Procedure § 4265.2 (Supp. 2001).

4. Further, the Ninth Circuit's asserted basis for deeming the state factual determination "objectively unreasonable" in this case departs from AEDPA's language. And it conflicts with this Court's interpretation, in *Early* v. *Packer*, 537 U.S. 3, 9 (2002) (per curiam), of "reasonableness" under § 2254(d).

a. In discerning (d)(2) "unreasonableness," the Ninth Circuit did not analyze the probative force of the evidence presented in state court; instead, it relied solely on the procedural basis that the state judge, in his extemporaneous oral ruling at the suppression motion, had not "mentioned" the hearsay testimony offered by defense witness Close in support of Taylor's version of the events surrounding the interrogation. (Appendix A22-A26.) Section 2254(d)(2), however, speaks of reasonableness not as a function of state fact-finding *procedures* but of the "*evidence* presented in the State court proceedings" instead. As this Court's opinion in *Wiggins* v. *Smith* in particular illustrates: when the fact-finding protected by the (e)(1) presumption is overcome under a proper understanding of the standard of "clear and convincing evidence to the contrary" (see pp. 11-13, *post*), a resulting state-court determination might be deemed "unreasonable" under (d)(2) so that an adjudication resting on it would not be protected by the normal absolute bar against federal habeas corpus relief.

b. In *Early* v. *Packer*, 537 U.S. at 9, this Court rejected the Ninth Circuit's similar attempt to rely, as a purported justification for refusing to defer to a state court ruling under § 2254(d), on the absence of an explicit statement by the state

court that it had considered the impact of certain evidence. In reversing this Circuit's decision summarily, as it has done in other Ninth Circuit AEDPA decisions that failed to defer to the state courts, this Court explained that the state court need not issue such a "formulary statement." Accord, *Miller-el* v. *Cockrell*, 123 S. Ct. at 1045 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it.").

Here, as in *Packer*, the Ninth Circuit again has deemed a State-court adjudication "unreasonable" under § 2254(d), not because the ruling rested on a state-court record evidentiary record that could not support it, but only because the state judge did not announce explicitly that he had considered certain evidence in arriving at his determinations. This Court again should intervene to require the Ninth Circuit to adhere to *Packer*.

B. Question Two

The second question presented in this petition is whether § 2254, by way of (d)(2) or the presumption of correctness of (e)(1), allows the federal habeas corpus court to re-weigh the "cold" State-court evidentiary-hearing record and reject state-court factual determinations rationally supported by the direct evidence of testifying witnesses. This question merits certiorari review too. For, as with the first question presented, it also implicates the important question of the relationship between the operation of (d)(2) and (e)(1). Also, in alternately purporting to find "clear and convincing" evidence rebutting the State's fact-finding (Appendix A34), the Ninth Circuit engaged in the kind of overly intrusive review that this Court has condemned in a number habeas corpus precedents and that is indistinguishable from impermissible de novo review of the facts.

1. In rejecting the state judge's explicit finding that the policeman's direct, in-court testimony was credible and that petitioner's was not, the Ninth Circuit decision conflicts with *Marshall* v. *Lonberger*, 459 U.S. 422 (1982). In *Lonberger*, this Court explained that the habeas-corpus statutory presumption gives federal courts "no license to redetermine credibility of witnesses whose demeanor has been observed by the State trial court, but not by them." 459 U.S. at 434; accord, *Maggio* v. *Fulford*, 462 U.S. 111, 113 (1983) (conclusion that state fact determination was not "fairly supported by the record" rejected because "in reaching this conclusion, the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts—a prerogative which [former] 28 U.S.C. § 2254 does not allow it."); *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (per curiam) ("§ 2254(d) provides that the state court's determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us."). Similarly, in accepting as uncontradicted an isolated assertion by the petitioner that he had asked to speak with a lawyer prior to the interrogation (Appendix A35), the Ninth Circuit decision conflicts even further with *Lonberger*. See 459 U.S. at 433-436; see also *LaValle* v. *DellaRose*, 410 U.S. 690 (1973) (per curiam).

It is true that this Court suggested in *Miller-el* v. *Cockrell* that a state court's credibility determination in some circumstances might be overcome under AEDPA. 123 S. Ct. at 1041. And the Warden can imagine that there might be extreme cases in which the pertinent witness had not appeared in person before the state judge and his testimony was improbable such that no reasonable jurist could have credited it in light of clear and convincing evidence that it was incorrect. Cf. *Wiggins* v. *Smith*, 123 S. Ct. at 2539 (state court fact-finding deemed unreasonable under (d)(2) and rebutted by "clear and convincing evidence" under (e)(1) where physical evidence of documents demonstrated impossibility of finding that documents contained

certain information). In such instances, the federal court—upon holding an otherwise proper evidentiary hearing of its own—might then find the evidence sufficient to overcome the State-court determination.

Absent extreme circumstances, however, rational factual determinations resting on the credibility of a witness whose plausible testimony conflicts with other testimony should not be re-weighed in federal court as a means of defeating the (e)(1) presumption. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.") As *Lonberger* and this Court's other precedents preclude a federal court from re-weighing the testimony in the service of characterizing the State record as insufficient to support State-court fact findings, it follows that a federal court may not merely label its "intrinsic" view of the same testimony—a view based on the "cold" record and without an evidentiary hearing of its own—as "clear and convincing evidence" disproving the findings. In any event, such State fact-finding, insofar as it finds a rational basis of support in the record, should not be deemed "unreasonable in light of the evidence presented in State court" under (d)(2).[2/]

It is highly doubtful that two writ-restricting provisions of the AEDPA, § 2254(d)(2) and (e)(1), would combine by some alchemy to infuse the federal habeas corpus court with enhanced

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2. The Ninth Circuit's brief mention of expert testimony adduced at trial concerning Taylor's intelligence level (Appendix A28, A41) would not justify rejection of the State court's factual determinations. The testimony was of only marginal value rather than of a "clear and convincing" nature under (e)(1). And, as it was not before the State judge at the pre-trial suppression hearing when he made his fact determinations, it logically cannot not serve to render judge's findings "unreasonable" under (d)(2).

powers at all, let alone enhanced powers in derogation of limits this Court earlier had imposed on such authority. For, as this Court has recognized, AEDPA places "more, rather than fewer, restrictions on the power of the federal court." *Miller-el* v. *Cockrell*, 123 S. Ct. at 1039-1040; accord, *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). But the Ninth Circuit opinion in these anomalous way treats AEDPA as expanding rather than contracting an applicant's opportunity for relief.

Here, even the Ninth Circuit acknowledged that "a rational factfinder" might "discount" or "find incredible" the hearsay testimony from witness Close upon which the panel so heavily relied. (Appendix A22.) Conversely, Detective Remine's testimony was entirely plausible rather than impossible and was contradicted merely by Taylor's self-serving statements. And Taylor's testimony itself was undermined by the tape-recording, heard by the trial court, that showed Taylor's express acknowledgment of his *Miranda* rights and waiver and of his voluntary decision to speak. (Appendix G25-26; Supplemental E.R. 67-68 [interview transcript].) The state judge—observing their demeanor under oath in a way that the Ninth Circuit could not—credited the detective's and not respondent's. In contrast, the evidence that apparently was most persuasive to the Ninth Circuit comprised the Close testimony that the state court and the district court recognized as unreliable hearsay. (Appendix A19-A20, A21-A23, A25, A27-A29, B25, F12.) Indeed, on a crucial point of obvious importance to the panel (*id.*, A32, 36-37), the Ninth Circuit opinion credited Close's claim that Taylor had said he asked for a lawyer on the way to the interrogation room even though Taylor himself never made such a claim in his own testimony. Under the proper version of the facts, as found by the State court, Taylor's *Miranda* and involuntary-confession claims were failures—as the State courts and the federal district court recognized. In re-weighing the State-court testimony and arriving at a conclusion contrary to that of the State-court judge, however, the Ninth Circuit strayed far beyond

the bounds of appropriate federal habeas corpus review of State-court fact-finding.

2. In the very recent past, this Court has stepped in and reversed—often summarily—Ninth Circuit misapplications of the AEDPA rule of deferential review of legal questions under § 2254(d)(1). E.g., *Yarborough* v. *Alvarado*, 124 S. Ct. 2140 (2004); *Middleton* v. *McNeil*, 124 S. Ct. 1830 (2004) (per curiam); *Yarborough* v. *Gentry*, 124 S. Ct. 1 (2003) (per curiam); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early* v. *Packer*, 537 U.S. 3 (per curiam). Now, a new series of cases shows that the Circuit is compounding its AEDPA failures by similarly refusing to defer to California-court resolutions of factual questions under § 2254 (d)(2) and (e)(1). E.g., *Collins* v. *Rice*, 366 F.3d 992 (9th Cir. 2004) (rejecting trial judge's determination crediting as genuine prosecutor's stated reasons for challenging juror); *Sanders* v. *Lamarque*, 357 F.3d 943 (9th Cir. 2004) (rejecting state court finding that a juror was prejudiced); *Nunes* v. *Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003) (rejecting state appellate court finding made without an "evidentiary hearing"); *Hall* v. *Director of Corrections*, 343 F.3d 976 (9th Cir. 2003) (rejecting state-court finding, made after evidentiary hearing, that written notes had not been doctored to falsify their meaning); *Avila* v. *Galaza*, 297 F.3d 911 (9th Cir. 2002) (rejecting state-court findings made after evidentiary hearing). Especially in view of this background, the case at bar demonstrates the need for this Court to step in again and ensure compliance with Congress' AEDPA plan and this Court's AEDPA precedents.

CONCLUSION

For these reasons, the Warden respectfully requests that the Court grant a writ of certiorari.

Dated: July 27, 2004

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEIF TAYLOR, *Petitioner-Appellant*, v. THOMAS M. MADDOX, Interim Director; GEORGE GALAZA; CAL TERHUNE, *Respondents-Appellees.*	No. 02-55560 D.C. No. CV-97-07033-RJK OPINION

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, Senior Judge, Presiding

Argued and Submitted
August 6, 2003—Pasadena, California

Filed May 10, 2004

Before: Alex Kozinski and Thomas G. Nelson,
Circuit Judges, and Jane A. Restani, Judge.*

Opinion by Judge Kozinski

*The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

COUNSEL

Sung B. Park, Van Nuys, California, for the petitioner-appellant.

Deborah J. Chuang, Deputy Attorney General, Los Angeles, California, for the respondents-appellees. Chuang was joined on the briefs by Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, and Kenneth C. Byrne, Supervising Deputy Attorney General.

OPINION

KOZINSKI, Circuit Judge:

Petitioner is serving a life sentence without the possibility of parole for a crime committed when he was sixteen years old. The conviction hinges on a full confession petitioner gave after he was arrested in his home late one night and interrogated by two police detectives past 3:00 a.m. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (1996), we consider whether the state courts were objectively unreasonable in finding that the confession was lawfully and voluntarily obtained.

Facts and Procedural History

On May 31, 1993, William Shadden was riding his bicycle through a beachside area in Long Beach, California, when two assailants attempted to take it from him. Shadden resisted and the assailants fled. Unwisely, Shadden gave chase and one of the assailants shot Shadden twice, killing him. Three months later, Detectives Craig Remine and William MacLyman, both of the Long Beach Police Department, came to suspect that Leif Taylor had been involved and obtained a search warrant for his apartment. Remine, MacLyman and at least two other law enforcement officers executed the search warrant and an arrest warrant for Taylor at roughly 11:30 p.m. on September 1, 1993.

They found Taylor sleeping on a couch in his living room; his mother, who was his only custodial parent, was apparently absent. Taylor was startled awake by four men with guns drawn and flashlights trained around the room. Taylor was permitted to dress; he was then handcuffed and driven to the police station. He arrived at the station ten minutes later, was escorted onto an elevator to the third floor and placed in a

small interrogation room, where he sat alone for about thirty minutes.

By the time Remine and MacLyman entered and began to question Taylor, it was past midnight. For three hours, the detectives interrogated the boy, who "was considerably younger and physically smaller" than they. *People* v. *Taylor*, No. B091340, at 6 (Cal. Ct. App. Dec. 6, 1996) (mem.) [hereinafter Ct. App. Opin.]. Taylor "was given no food, offered no rest break, and may or may not have been given any water." *Id.* Neither Taylor's mother[1] nor an attorney was present to advise him during questioning. Taylor denied involvement in the crime "[f]or in excess of two and a-half hours," *id.* at 5, before finally inculpating himself. At the detectives' behest, he then memorialized on audio tape his confession and a waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Begun at 3:02 a.m. and completed at 3:13 a.m., the recording was just eleven minutes long; there is no record of the earlier two-and-a-half hours of questioning. This is so because Remine and MacLyman questioned Taylor without turning on the tape recorder eventually used to record his confession—or the hidden recording equipment installed in the interrogation room—until after he had inculpated himself. Remine took notes during the questioning but subsequently disposed of them.[2] There is no videotape, so we cannot see whether Taylor was calm and cool or tearful and agitated; nor do we have the audio tape to listen to.[3] Indeed, there is no

[1] The record does not disclose where Taylor's mother was at this time, nor what efforts, if any, were made to locate her.

[2] A day after the suppression hearing, Remine testified at Taylor's trial that he had thrown away his notes of the interrogation. Thus, it appears likely that he had already gotten rid of them prior to the suppression hearing. In any event, the notes were never consulted on the record nor introduced into evidence.

[3] Responding to our request for the tape-recording of Taylor's confession, the state advised that all trial exhibits, including the tape, had been destroyed on June 16, 1999, and that the Los Angeles County District Attorney's office does not possess any copies of the recording. Letter from Deborah J. Chuang, Deputy Attorney General, to Office of the Clerk, U.S. Court of Appeals 1 (Sept. 4, 2003).

contemporaneous record at all of what happened during most of the time that Taylor spent in the interrogation room with Remine and MacLyman.

The tape of Taylor's confession was played for the jury during the prosecution's case-in-chief. The jury subsequently convicted Taylor of first-degree felony murder and second-degree robbery; he was sentenced to life without the possibility of parole. The California Court of Appeal (Second District) (Ortega, Acting P.J.) affirmed; the California Supreme Court denied his petition for review without comment or citation.

Discussion

The district court below denied Taylor's *pro se* petition for habeas relief, adopting the magistrate judge's report and recommendation without modification. We review the district court's denial of Taylor's habeas petition *de novo*. *Dows* v. *Wood*, 211 F.3d 480, 484 (9th Cir. 2000).

1. At all stages in the state-court proceedings, Taylor challenged the admissibility of his confession on the grounds that it was coerced and obtained in violation of *Miranda* and *Edwards* v. *Arizona*, 451 U.S. 477 (1981), because the detectives who interviewed him did not cease their questioning after he asked to speak to an attorney. As part and parcel of these claims, Taylor consistently challenged the state trial court's findings that the detectives did not engage in misconduct and that he did not invoke his right to counsel. *See* Appellant's Opening Br. at 29 n.8, *People* v. *Taylor*, No. B091340 (Cal. Ct. App. Dec. 6, 1996); Petition for Review at 14, *People* v. *Taylor*, No. B091340 (Cal. Jan. 14, 1997). Taylor therefore presented these issues to the state courts and properly exhausted his claims. *See* 28 U.S.C. § 2254(b)(1)(A); *Baldwin* v. *Reese*, 124 S. Ct. 1347, 1351 (2004) ("A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief . . . by

citing in conjunction with the claim the federal source of law on which he relies . . . .").

Taylor also preserved these claims by raising them in his *pro se* federal habeas petition before the district court, and in his *pro se* petition for a certificate of appealability before us. *See* Request for the Issuance of a Certificate of Appealability at 3 ("I respectfully submit here that it was the very failure of the District Court . . . to conduct a proper review of my *Miranda* claims that warrants relief here as I plainly argued that their resolution revolved around the purely factual question of what happened during the police interrogation . . . ."). We granted a certificate of appealability as to "whether appellant's *Miranda* rights were violated, and whether his confession was involuntary." Certificate of Appealability at 1.

2. Taylor's state-court lawyer moved to suppress his inculpatory statements and, the day before trial commenced, Judge Charles Sheldon of the Superior Court of Los Angeles County held an evidentiary hearing pursuant to section 402 of the California Evidence Code.[4] Taylor testified that he repeatedly asked for a lawyer, but the detectives denied his requests and engaged in threatening behavior. Detective Remine, who also testified, denied these allegations. Immediately after hearing all testimony and closing arguments, the court denied the suppression motion from the bench:

> I am a fact finder first, and I have to decide and say who I believe. I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer Ramine [sic] and not the testimony of the defendant in this case. Not only because it is the defendant in this case, but for other reasons, which were the

[4] Section 402 provides in relevant part: "[I]n a criminal action, the court shall hear and determine the question of admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests." Cal. Evid. Code § 402(b).

> nature of the facts that were developed by both sides. Leading me, in addition, to my feelings about who I should believe and who I really do believe, but also, why I should believe as a secondary or perhaps a primary, to look at with that crediting Officer Ramine's [sic] testimony. It now sheds light upon the decision.
>
> [Defense counsel] makes the best case, of course, it is made primarily by the testimony of a witness I do not credit in this case. I find there was no violation of Miranda, the Miranda rights were given ahead of time, when they have been given before incriminating statements were given. I find it is voluntary under the case law, that has developed on this whole issue, hundreds and hundreds of cases, actually, on this issue just like search and seizure, so I find it is both not a violation of Miranda, voluntary, I decline to suppress the statements that were given by the defendant to the officers in this case.

R.T. at 70-71.

After summarizing Taylor's and Remine's testimony, the court of appeal affirmed in an unpublished opinion, saying only that "[t]he evidence found credible by the trial court supports the determination that the waiver and confession were voluntary." Ct. App. Opin. at 10.[5] While the trial court's ruling was not a model of clarity, we construe it as finding that Taylor did not request counsel or his mother, that he confessed voluntarily and that the detectives behaved properly.

[5] We analyze the court of appeal's decision as the relevant state-court determination because the state supreme court denied Taylor's petition for review without citation or comment. *Shackleford* v. *Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). However, because the court of appeal adopted the reasoning of the trial court, we also discuss the trial court's decision. *Lewis* v. *Lewis*, 321 F.3d 824, 829 (9th Cir. 2003).

[1] Principles of comity and federalism counsel against substituting our judgment for that of the state courts, a deference that is embodied in the requirements of the federal habeas statute, as amended by AEDPA. When it comes to state-court factual findings, AEDPA has two separate provisions. First, section 2254(d)(2) authorizes federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Or, to put it conversely, a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable. *Cf. Lockyer* v. *Andrade*, 538 U.S. 63, 75 (2003) ("The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable."); *see also Torres* v. *Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000) (same standard of unreasonableness applies under subsections (d)(1) and (d)(2)). Second, section 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that this presumption of correctness may be rebutted only by "clear and convincing evidence."

We interpret these provisions sensibly, faithful to their text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy. The first provision—the "unreasonable determination" clause—applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, *see, e.g.*, *Wiggins* v. *Smith*, 123 S. Ct. 2527, 2538-39 (2003); *Ward* v. *Sternes*, 334 F.3d 696, 705-08 (7th Cir. 2003), that the process employed by the state court is defective, *see, e.g.*, *Nunes* v. *Mueller*, 350 F.3d 1045, 1055-56 (9th Cir. 2003); *Valdez* v. *Cockrell*, 274 F.3d 941, 961-68 (5th Cir. 2001) (Dennis, J., dissenting), or that no

finding was made by the state court at all, *see, e.g.*, *Weaver* v. *Thompson*, 197 F.3d 359, 363 (9th Cir. 1999); *cf. Wiggins*, 123 S. Ct. at 2539-41. What the "unreasonable determination" clause teaches us is that, in conducting this kind of intrinsic review of a state court's processes, we must be particularly deferential to our state-court colleagues. For example, in concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. *Cf. Lockyer*, 538 U.S. at 75. Similarly, before we can determine that the state-court fact-finding process is defective in some material way, or perhaps non-existent, we must more than merely doubt whether the process operated properly. Rather, we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

Once the state court's fact-finding process survives this intrinsic review—or in those cases where petitioner does not raise an intrinsic challenge to the facts as found by the state court—the state court's findings are dressed in a presumption of correctness, which then helps steel them against any challenge based on extrinsic evidence, *i.e.*, evidence presented for the first time in federal court. AEDPA spells out what this presumption means: State-court fact-finding may be overturned based on new evidence presented for the first time in federal court only if such new evidence amounts to clear and convincing proof that the state-court finding is in error. *See* 28 U.S.C. § 2254(e)(1). Significantly, the presumption of correctness and the clear-and-convincing standard of proof only come into play once the state court's fact-findings survive any intrinsic challenge; they do not apply to a challenge that is governed by the deference implicit in the "unreasonable determination" standard of section 2254(d)(2).

Petitioner here did not present any evidence in federal court. Instead, the district court rejected petitioner's claim at the initial, or intrinsic, stage of the review process. The appeal before us is therefore governed by the "unreasonable determination" standard of section 2254(d)(2). What we must determine is whether petitioner's conviction "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." This is a daunting standard—one that will be satisfied in relatively few cases. Nevertheless, the standard is not impossible to meet; as the Supreme Court pointed out in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), "Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable." *Id.* at 340. Indeed, the Supreme Court, our court and other circuits have all found the standard met. *See Wiggins*, 123 S. Ct. at 2538-39; *Norton* v. *Spencer*, 351 F.3d 1, 6-8 (1st Cir. 2003); *Ward*, 334 F.3d at 705; *Nunes*, 350 F.3d at 1056; *Hall* v. *Dir. of Corrections*, 343 F.3d 976, 983 (9th Cir. 2003); *Bui* v. *Haley*, 321 F.3d 1304, 1315 (11th Cir. 2003); *Miller* v. *Dormire*, 310 F.3d 600, 603-04 (8th Cir. 2002); *Bradley* v. *Duncan*, 315 F.3d 1091, 1096 (9th Cir. 2002); *Paxton* v. *Ward*, 199 F.3d 1197, 1210 (10th Cir. 1999).

As noted, intrinsic challenges to state-court findings pursuant to the "unreasonable determination" standard come in several flavors, each presenting its own peculiar set of considerations. No doubt the simplest is the situation where the state court should have made a finding of fact but neglected to do so. In that situation, the state-court factual determination is perforce unreasonable and there is nothing to which the presumption of correctness can attach. *See, e.g.*, *Wiggins*, 123 S. Ct. at 2539-40; *Killian* v. *Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Weaver*, 197 F.3d at 363; *Nunes*, 350 F.3d at 1055. A somewhat different set of considerations applies where the state court does make factual findings, but does so under a misapprehension as to the correct legal stan-

dard. *See, e.g.*, *Caliendo* v. *Warden*, 2004 WL 720362, at *6 (9th Cir. Apr. 5, 2004); *Fernandez* v. *Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002); *Wade* v. *Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000). Obviously, where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it.

[2] Closely related to cases where the state courts make factual findings infected by substantive legal error are those where the fact-finding process itself is defective. If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of the facts. *See, e.g.*, *Weaver*, 197 F.3d at 363; *Nunes*, 350 F.3d at 1055; *cf. Bryan* v. *Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (declining to apply presumption where state court failed to hold an evidentiary hearing). *But see Valdez*, 274 F.3d at 948-50 (sections 2254(d)(2) and (e)(1) apply despite defects in the state-court hearing). Similarly, where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. *See, e.g.*, *Wiggins*, 123 S. Ct. at 2538-39; *Hall*, 343 F.3d at 983. And, as the Supreme Court noted in *Miller-El*, the state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim. *Miller-El*, 537 U.S. at 346 ("Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past."); *accord Collins* v. *Rice*, 348 F.3d 1082, 1097 (9th Cir. 2003), *as amended and superseded on denial of reh'g by* 2004 WL 743723 (9th Cir. Apr. 8, 2004).

Petitioner here claims the latter kind of defect in the state-court fact-finding process—failure to consider and weigh relevant evidence that was properly presented to the state courts and made part of the state-court record. In considering this kind of claim, we are mindful that the state courts are not required to address every jot and tittle of proof suggested to them, nor need they "make detailed findings addressing all the evidence before [them]." *Miller-El*, 537 U.S. at 347. To fatally undermine the state fact-finding process, and render the resulting finding unreasonable, the overlooked or ignored evidence must be highly probative and central to petitioner's claim. In other words, the evidence in question must be sufficient to support petitioner's claim when considered in the context of the full record bearing on the issue presented in the habeas petition. We therefore proceed by reciting the evidence presented at Taylor's suppression hearing.

3. In his testimony at the suppression hearing, Taylor gave a disturbing account of his interrogation. He recalled that he awoke to find a flashlight and a gun pointed at him, and his living room filled with men. As he was handcuffed and placed in a police car, he was not told why he was being arrested. Taylor asked the officer driving the car if he knew the reason for the arrest. The officer said Taylor would be told at the station. Taylor also asked the officer if he "could call . . . [his] mom when . . . [he] got there. [The officer] . . . said that she would be notified for . . . [him]." R.T. at 32.

Once at the station, Taylor recounted, he was taken on an elevator to an upper floor, where he waited alone in a small interrogation room for about thirty minutes. When Remine and MacLyman arrived, they did not tell him immediately why he had been arrested, asserting instead that he knew why he was there. MacLyman—who Taylor described as "the bigger fellow"—wore a ring inscribed with the police code for murder, "187," which he thrust in Taylor's face, saying, " 'Well, you know why you're down here.' " *Id.* at 34. Mac-

Lyman then told Taylor he had been arrested in connection with Shadden's killing.

During the questioning that followed, Taylor asked several times to speak to his mother[6] and an attorney named Arthur Close. Taylor was adamant in his assertions at the suppression hearing that he had requested counsel before incriminating himself. For example:

> Q: . . . [D]id you ask to speak to anyone?
>
> A: I asked to speak with my attorney. I told . . . [the detectives] I knew an attorney from the outs. I thought maybe I could call him to get some advice, and they told me no, it wouldn't be possible.
>
> Q: Did you ask to speak with anyone else?
>
> A: I then asked, "Well, can I speak with my mother, can I call her?" And they told me, no.

Id. at 35-36. Similarly:

> Q: . . . Did you ask to speak to a lawyer?
>
> A: Yes.

---

[6] Under California law, a minor subject to custodial interrogation invokes the Fifth Amendment by asking to see a parent. *See People* v. *Burton*, 6 Cal. 3d 375, 383-84 (1971). Upon such a request, before or during questioning, "[t]he police must cease custodial interrogation immediately." *Id.* at 384. While state law cannot provide the basis for federal habeas relief, *see Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991), state law may supply the means for asserting federal rights. For example, if state law provides that a minor who asks for his parent thereby invokes his federal right to remain silent, we may well deem the right invoked upon the utterance of such a request. Because petitioner here claims he asked for a lawyer, nothing hinges on his also having asked for his mother. We therefore need not resolve the issue and leave it for another day.

Q: And did you ask to speak to a specific lawyer?

A: Yes, I did.

Q: Did you have the telephone number of a lawyer to call?

A: Yes, I did.

Q: And do you remember that telephone number now?

A: I do.

Q: What telephone number is that?

A: Area code 310, 599-6448.

. . . .

Q: . . . Did you want to talk to these detectives?

A: No, I didn't.

Q: Did you want to talk to Art Close before you talked to the detective?

A: Yes.

Q: Did you try to do that?

A: Yes.

Q: Did somebody prevent you from doing that?

A: Yes.

Q: Who did that?

A: One of the detectives, I can't remember.

Q: How did they prevent you?

A: They told me it wouldn't be possible. They told me just, you know, they wanted me to tell them what they wanted to hear. They told me just to tell them what happened, and they would let me use the phone.

Id. at 40-43. And again:

Q: [After some questioning had elapsed], did you still want to speak to your lawyer or a lawyer?

A: Several times, I mentioned to speak to him.

Id. at 46. And on cross-examination by the prosecution:

Q: [The detectives] . . . told you you couldn't have an attorney?

A: They didn't tell me I couldn't have one. They told me I couldn't make a phone call to one.

Q: You said "I want to call an attorney?"

A: Yes.

Q: . . . You didn't say, you want to call Art?

A: I said I want to call an attorney, and they said who, ...

Id. at 56. In these and other exchanges, Taylor never wavered in his assertion that he wanted to call a lawyer during his interrogation and asked for access to a phone in order to do so.

According to Taylor, the detectives denied his requests. Instead, MacLyman drew long and short lines on a piece of paper, explaining to Taylor that he could go to jail for the rest of his life (long line) or just until he was twenty-five (short line), depending on whether he cooperated with the detectives. MacLyman also coaxed Taylor, saying he knew Taylor didn't kill Shadden deliberately but had done so unintentionally. Although Taylor steadfastly denied involvement, the detectives persisted in the questioning and would not permit Taylor to make a phone call until he told them "the truth."

Taylor became desperate and upset. Concluding that he could clear up the matter later, Taylor decided to yield to the detectives' insistent demands that he confess in order to gain access to a phone. He then made the eleven-minute recording memorializing his *Miranda* waiver and confession. Explaining why he would give a false confession, Taylor said,

> I am getting tired, so I just started agreeing with everything so I can get out and make a phone call, because I was thinking, you know, *well I didn't do it anyways*, so why don't I just try to get out of the room to get my phone call and just tell them what they want to hear.

Id. at 46-47 (emphasis added). He reiterated,

> I was just tired, you know. I wanted to get out of that room, for one thing. I was thinking, you know, you know, I am just not knowing what was going on. I am thinking these guys are supposed to be the good guys. I was never involved in any serious crime, so if I just agree with them, get my phone call, I will get it straightened out, I will go home.

Id. at 47.

Taylor recalled that, at some point, he was given a form advising him of his *Miranda* rights and signed it to indicate

his waiver of those rights. His testimony was unclear as to whether he signed the advisement form before or after he initially inculpated himself, but he asserted he was not shown the form and did not sign it until well after the bulk of the interrogation was concluded. Taylor also claimed he was so upset that he didn't pay attention to the advisement and merely signed the form as instructed. In response to questioning by defense counsel, Taylor explained that the detectives made it hard for him to read the form:

> Q: Did you read that document before you signed it?
>
> A: No, I didn't.
>
> Q: Did anybody read it to you?
>
> A: Not that I can recall.
>
> Q: Why didn't you read it, were you given—why didn't you read it?
>
> A: I didn't read it. I wasn't allowed to read it. It was just "sign here" and their hand stayed on the paper.
>
> MR. SCHMOCKER: Your honor, may the record reflect that the witness turned the paper around as if showing it to somebody else.
>
> THE COURT: All right. And he had his hand over part of the upper part of the paper.
>
> Q by MR. SCHMOCKER: Was there a hand over a part of that upper part of that paper?
>
> A: Yes, sir[,] there was.

Id. at 38-39.

MacLyman, the bête noire in Taylor's account of these events, did not testify at the suppression hearing. Remine, who did testify, related a story very different from Taylor's—or, at least, professed to lack specific recollection on key points in Taylor's story. Remine asserted that Taylor had been advised of his *Miranda* rights immediately after Remine and MacLyman joined him in the interrogation room, and that he had waived his rights at that time by signing the advisement form. Remine did confirm that MacLyman wore a "187" ring and that the interrogation room was on an upper floor in the police station. He denied or could not recall that Taylor appeared emotional during questioning, that Taylor asked to speak with his mother, that MacLyman thrust his "187" ring in Taylor's face, and that MacLyman mapped lines representing potential sentences. Remine also denied that he told Taylor he knew Taylor hadn't intended to kill the victim; he was never asked whether MacLyman made that statement. When asked by defense counsel whether Taylor asked to speak with Close, Remine replied, "I don't recall him making that statement." *Id.* at 17.

Asked by defense counsel if Taylor requested a lawyer *prior* to signing the advisement form, Remine unqualifiedly stated, "No, sir." *Id.* at 21. But when defense counsel asked whether Taylor asked for a lawyer *after* signing the form, Remine ambiguously replied, "Not to my recollection, he did not," *id.*, and to counsel's repeated inquiry whether Taylor ever asked to speak with a lawyer named Close, Remine hedged, "I don't recall him saying that, no, sir," *id.* Remine also denied that Taylor had asked for his mother before questioning and could not recall whether he had asked for his mother during questioning. The prosecutor did not seek to clarify the ambiguities in Remine's testimony, and never asked Remine if Taylor had asked to speak with counsel at any point.

In evaluating the relative credibility of these two sharply differing accounts of the events inside the interrogation room, the state courts treated this as a swearing-contest between Taylor and Remine. The state trial judge simply said that he believed Remine, not Taylor. He purported to give reasons for disbelieving Taylor's account of the interrogation, but his explanation defies rational understanding:

> Not only because it is the defendant in this case, but for other reasons, which were the nature of the facts that were developed by both sides. Leading me, in addition, to my feelings about who I should believe and who I really do believe, but also, why I should believe as a secondary or perhaps a primary, to look at with that crediting Officer Ramine's [sic] testimony. It now sheds light upon the decision.

Id. at 70-71.[7]

The court of appeal found that Remine's testimony constituted a sufficient basis in the record for the trial court's findings, and therefore affirmed. Remarkably, neither the state trial court nor the state appellate court acknowledged that another witness testified at the suppression hearing—attorney Arthur Close, who said he received a telephone call from Tay-

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[7] We would normally attribute incoherence in the trial court's explanation to mistakes in the transcribing process. However, we have carefully read the record and have found no unusual problems with the transcript of the suppression hearing. Everyone else who spoke is perfectly understandable. Nor is the passage quoted in text the only one in the judge's ruling that is less than pellucid. Just two sentences later, we also find this muddled passage:

> I find it is voluntary under the case law, that has developed on this whole issue, hundreds and hundreds of cases, actually, on this issue just like search and seizure, so I find it is both not a violation of Miranda, voluntary, I decline to suppress the statements that were given by the defendant to the officers in this case.

R.T. at 71.

lor in the early morning hours of September 2, 1993, shortly after Taylor had given his confession. As detailed below, Close's testimony strongly corroborates Taylor's account of the interrogation and stands entirely unrefuted. Neither the state trial court nor the state appellate court found that Close had fabricated his testimony, nor was there any basis in the record for such a finding. The state courts simply ignored Close. For the reasons explained at length below, the state courts' failure to consider, or even acknowledge, Close's highly probative testimony casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decisions were based on an unreasonable determination of the facts.

4. Close testified that Taylor had called him at home, at "approximately four a.m." on September 2. *Id.* at 58. Taylor told Close that he had just confessed to murder, that he had requested his mother and Close more than once, that he had been prevented from making a phone call until after he confessed, that he had confessed falsely in order to gain permission to make that phone call, and that one of the two detectives questioning Taylor had thrust a "187" ring in his face, and had drawn a diagram to illustrate the alternatives facing Taylor depending on whether or not he cooperated by confessing.[8] Close explained that Taylor did not tell him the exact significance of the diagrammed alternatives, only what had transpired. In all of these respects, Close substantially corroborated Taylor's story. But Close's testimony also went beyond the scope of Taylor's, for Close testified that "[Taylor] said he requested, by name, to speak to me on the elevator in the police department, prior to the questioning." *Id.* at 62. Close further testified that Taylor was crying and upset during the call and that Taylor provided these details without prompting from Close.

[8] Because we deem Close's testimony central to the resolution of this case, we reproduce it in full in the appendix.

The state trial judge said nothing at all about Close's testimony. In reviewing the trial court's ruling at the suppression hearing, the court of appeal similarly failed to mention Close's testimony or to consider its remarkable congruence with Taylor's account of what had transpired during his interrogation. The court of appeal only passingly discussed Close's testimony in upholding its exclusion *at trial* under section 1250 of the California Evidence Code. In describing Close's testimony as to that issue, the court of appeal noted that Close said Taylor " 'was in tears and highly agitated' " during the phone call early on September 2. Ct. App. Opin. at 7. The court of appeal also quoted defense counsel's proffer at trial: " '[H]e received a call from [defendant] about four a.m. and . . . [defendant], at that time, said that he had given a false confession to a cop in order to make a phone call to Mr. Close in his capacity as a lawyer.' " *Id.* Thus, the court of appeal was aware of Close's testimony, yet never considered or even acknowledged that it corroborated particularly unusual details in Taylor's story: that Taylor rode an elevator to the floor where the interrogation room was located (at which time he allegedly asked for counsel), that Taylor asked for his mother, that one of the detectives wore a ring inscribed with a "187" and brandished the ring in Taylor's face, and that the detective with the ring "mapped" out Taylor's possible fate by drawing "a diagram of two different routes of what would happen to him. One route if he cooperated and confessed, the other route that if he refused to do so, and what the consequences would be." R.T. at 61. Nor did the court of appeal consider that Close testified that Taylor had told Close his requests for counsel and his mother had been denied. In other words, the court of appeal, like the state trial court, ignored the detailed quality of Close's testimony and the fact that it matched Taylor's account of the events inside the interrogation room.

[3] While Close's testimony is based on what Taylor told him during their telephone conversation following the end of the interrogation, it nevertheless corroborates Taylor's

account in important respects.[9] To begin with, the record discloses that Taylor called Close at the first available opportunity. Taylor's taped confession ended at 3:13 a.m., and he was thereafter booked—a process that was completed no earlier than 3:55 a.m.[10] Close testified that he received Taylor's call at approximately 4:00 a.m. This confirms Taylor's claim that he wanted to get in touch with Close at the first available opportunity. Moreover, Taylor's call also confirms his claim that he could, in fact, get in touch with a lawyer, even in the middle of the night: He knew Close's home phone number and felt comfortable waking him. Perhaps most important, the details of Taylor's story, as related to Close during their telephone conversation, precisely matched Taylor's testimony at the suppression hearing, precluding the possibility that Taylor had fabricated those details during the eleven months between his confession and the hearing. Finally, Close testified that, during the telephone conversation, Taylor was "in tears and highly agitated." *Id.* at 60. This contradicts Remine's account that Taylor was calm during questioning and confirms Taylor's account of the interrogation as a coercive ordeal.

[4] While Close's testimony is perhaps not conclusive, it is certainly highly probative. A rational fact-finder might discount it or, conceivably, find it incredible, but no rational fact-finder would simply ignore it. Yet this is precisely what the state courts did in Taylor's case. At the end of the suppression hearing, the state trial court, in a ruling that is diffi-

[9] It is unclear whether, under California law, hearsay is admissible at a suppression hearing irrespective of whether it falls within an exception. *See People* v. *Johnson*, 3 Cal. Rptr. 3d 507, 522-23 (Ct. App. 2003), *rev. granted & opinion superseded by* 6 Cal. Rptr. 3d 421 (Nov. 12, 2003) (No. S119230). In any event, Close's testimony was admitted without a hearsay objection.

[10] After the interview ended at 3:13 a.m., Ct. App. Opin. at 5, the record indicates that Taylor went through booking procedures. It is unclear how long the procedures took, but MacLyman testified at the preliminary hearing that Taylor was logged as booked at 3:55 a.m. R.T. of Prelim. Hearing at 18.

cult to follow, *see* pages 5899-5900, 5912 & note 7 *supra*, found Remine credible and Taylor incredible, and that was that. The court said nothing at all about Close, not even so much as to acknowledge that he had testified just minutes earlier. The state appellate court was similarly laconic, utterly failing to discuss the significance, or even the existence, of Close as a witness at the suppression hearing, even though the importance of his testimony was vigorously argued in Taylor's brief.[11] A decision on which turns whether a teenager will spend the rest of his days behind bars merits closer judicial attention from the state courts.

In instructing jurors about their fact-finding function, we

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[11] Taylor summarized Close's testimony as follows:

> *Testimony of Attorney Close.*
>
> Attorney Arthur Close testified that at approximately 4 a.m. on September 2, 1993, he got a telephone call from appellant. Close knew appellant from a community graffiti cleanup program, and because appellant had done chores for Close and his neighbors.
>
> Appellant was in tears and highly agitated. Appellant told Close that he had just confessed to committing a murder, because he had been interrogated for four hours and was not able to make a telephone call until he did. Appellant stated that he had asked at least four times to have his lawyer present, and had also asked to have his mother present, but had been denied permission to do so.
>
> Appellant stated that, during the interrogation, one of the officers kept pushing a diamond ring with the number "187" in his face, and that he drew a diagram of two different routes of what would happen to him. One route depicted what would happen to appellant if he cooperated and confessed, and the other route depicted what the consequences would be if he refused to do so.
>
> Appellant was adamant that he did not commit the murder and stated that the only reason he confessed was because he wanted to telephone his lawyer and mother. Close advised appellant not to make any more statements to the police without an attorney.

App. Opening Br. before Cal. Ct. App. at 12-13 (citations to record omitted).

normally advise them to consider the entire record, not individual pieces of evidence standing alone. *See United States* v. *Bertoli*, 40 F.3d 1384, 1401 (3d Cir. 1994); *United States* v. *Betancourt*, 838 F.2d 168, 175 (6th Cir. 1988); *United States* v. *Minyard*, 461 F.2d 931, 934 (9th Cir. 1972); *Kearney* v. *Bell*, 160 Cal. 661, 668-69 (1911); *Breuner Co.* v. *Allred*, 98 Cal. App. 92, 96 (Ct. App. 1929); *see, e.g.*, CALJIC 2.50.2 ("You should consider all of the evidence bearing upon every issue . . . ."); CALJIC 8.84.1 ("Both the People and the defendant have a right to expect that you will consider all of the evidence . . . ."). This reflects the philosophy of our common-law fact-finding process, namely, that the various pieces of evidence and testimony in the record must be considered in light of all the others. Testimony may seem implausible standing alone, yet gain considerable force when confirmed in a material respect by an independent source or by an objectively verifiable fact. Similarly, testimony may seem highly plausible, yet be discredited when it is shown to be irreconcilably in conflict with other evidence. Fact-finding is thus a dynamic, holistic process that presupposes for its legitimacy that the trier of fact will take into account the entire record before it.

[5] What goes for juries goes no less for judges. In making findings, a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings. The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be un-explainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding. *See, e.g.*, *Gui* v. *INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) (failure of immigration judge to support adverse credibility finding with specific, cogent reasons constituted grounds for reversal); *Winans* v.

Bowen, 853 F.2d 643, 647 (9th Cir. 1988) (failure of ALJ to give specific reasons for ignoring treating physician's opinion constitutes grounds for reversal).

As noted, neither the state trial court nor the state appellate court so much as mentioned Close's testimony in ruling on the admission of Taylor's confession, much less discussed what light this testimony cast on the striking differences in the descriptions of the interrogation given by Taylor and Remine. This was a major omission. Close was not a random witness testifying to a collateral detail. Rather, he was the very lawyer that Taylor claims he had asked for during his interrogation. As discussed at greater length below, the very fact that Taylor made the call to the lawyer immediately upon being given access to a phone, and that the story he told Close (as recounted in Close's testimony) was consistent with Taylor's own testimony as to significant and unusual details, makes Close's testimony highly probative. Moreover, Close knew Taylor and expressed a view as to how Taylor sounded during the phone call—a description that backed up Taylor's account of events and undermined Remine's. The state courts might have disbelieved Close, or perhaps discounted his testimony, but they were not entitled to act as if it didn't exist.

[6] Failure to consider key aspects of the record is a defect in the fact-finding process. *Miller-El*, 537 U.S. at 346; *Collins*, 348 F.3d at 1097. How serious the defect, of course, depends on what bearing the omitted evidence has on the record as a whole. Here, Close's testimony was very significant, as it provided the only glimpse into the events on the night of the interrogation by someone who was not one of the contending parties. It is not as good a look as we could have had, if the officers had taped the entire interview, or had permitted Taylor to have his mother or a lawyer present during questioning—or even if they had kept the notes of the interrogation. But it is much better evidence than we usually have because the phone call to Close "locked" Taylor's story soon after the interrogation ended and just minutes after Taylor was

booked, and thereby foreclosed the opportunity for Taylor to embellish or fabricate after reflection or based on advice he got from friends, relatives or fellow inmates. By making their findings without taking Close's testimony into account, the state courts made an "unreasonable determination of the facts." In passing section 2254(d)(2), Congress has reminded us that we may no more uphold such a factual determination than we may set aside reasonable state-court fact-finding. When we determine that state-court fact-finding is unreasonable, therefore, we have an obligation to set those findings aside and, if necessary, make new findings.

The question remains whether we should make those findings ourselves, or remand for the district court to make them in the first instance. If petitioner were seeking to introduce new evidence in support of his view of the facts, we would have no choice but to remand. But petitioner is not seeking to introduce new evidence; he merely asks us to make findings as to what happened during his interrogation, based on evidence presented to the state courts. In such circumstances, we are in no worse a position than the district court to make the findings. *See, e.g.*, *Wiggins*, 123 S. Ct. at 2539-41. And making the findings ourselves serves the interest of judicial economy because it obviates the need for a possible appeal (by one side or the other) from the district court's ruling. It also serves the interest of justice because, were we to find in favor of petitioner, we would then be able to determine the relief to which he is entitled. Given that petitioner has already served over ten years of his sentence, we see no reason for further delay and proceed to find the facts ourselves.

5. Because Remine and Taylor gave contradictory accounts of what transpired inside the interrogation room, we start by considering what weight to give Close's testimony. We note that Close's testimony satisfies the customary criteria of reliability: It is direct and precise, internally consistent and plausible. *See Anderson* v. *City of Bessemer*, 470 U.S. 564, 575 (1985); *see also Spain* v. *Rushen*, 883 F.2d 712, 719 (9th

Cir. 1989). Close did not back-track or equivocate; he did not claim a failure of memory. As a lawyer, Close was doubtless acutely aware of his duty to speak candidly, and of the criminal and professional consequences of failure to do so. Moreover, Close told Taylor that he (Close) would likely be called upon to testify about their conversation; he was thus aware of the need to commit the details of the conversation to memory. His testimony was also confirmed as to two significant details. Close said that one of the officers wore a ring with "187" inscribed on it, as Detective Remine also testified. Further, Detective Remine testified that the interrogation room was on the third floor, thus indirectly confirming Close's testimony that Taylor rode an elevator at the police station. Other details, such as the timing of the call, are consistent with the record. *See* page 5914-15 & note 10 *supra*. If Close's testimony is to be disbelieved or discounted, it would be on two possible grounds: Either Close committed perjury in coordination with Taylor, or Taylor lied, not only at the suppression hearing, but also when he called the attorney.

There is nothing in the record to suggest that Close would put his license to practice law on the line by perjuring himself in order to support Taylor's story. *Cf. Norton*, 351 F.3d at 7 (refusing to infer a no-credibility finding where, among other things, there was no evidence in the record impugning the credibility of the affiants). From what we know of Close and Taylor, the two did not have the kind of personal relationship that might have motivated Close to lie.[12] The prosecution did

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[12] In response to defense counsel's questions, Taylor explained how he knew Close and had learned Close's phone number by heart:

> Q: How did you come to have . . . [Close's] telephone number in your possession, that telephone number of Art?
>
> A: There was several times I did yard work around his house, and he used to have a lot of minors go around painting the neighborhood, painting the graffiti, painting over it. And he gave me his card one day, and told me if I ever needed it, to give him a call.

not attempt to impugn Close's credibility; its entire cross-examination consisted of one question:

> [PROSECUTION]: Mr. Close, I am not quite clear, did [Taylor] tell you "I lied to the police and confessed to them," or did he tell you "I confessed?"
>
> [CLOSE]: No, he adamantly insisted that he didn't do it, but the only reason he confessed was because he was desirous of making a phone call to his lawyer and his mother. He said that was the reason for the confession.
>
> [PROSECUTION]: No further questions, your Honor.

R.T. at 63. Neither the state trial court nor the court of appeal found that Close had lied at the suppression hearing, and we find no basis for doing so.

Nor do we find plausible the alternative theory for discrediting Close's testimony, namely, that Taylor had fabricated the story of the false confession out of whole cloth by the time he called Close. The record reveals that Taylor has only a low-average IQ. *See* page 5934 *infra*. We think it highly improbable that a sixteen-year-old boy, of limited mental acuity and with a minimal police record, *see* page 5931-32 *infra*, had the wherewithal to concoct a tale of police intimidation,

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> Q: And you had that, did you have that card with you on September, the early morning hours of September second?
>
> A: No, I didn't.
>
> Q: How did you know his phone number?
>
> A: I had his phone number memorized because I have called him several times asking if he needed work done.

R.T. at 41-42.

filled with graphic details, in the short span between the end of his interrogation and his phone call to Close. Taylor was a teenager without parent, attorney or friend, taken from his home at gunpoint in the dead of night and then questioned at length by two police officers, and thus was particularly vulnerable to the inherently coercive environment in which he found himself. *Cf. Haley* v. *Ohio*, 332 U.S. 596, 600-01 (1948) (finding involuntary the confession of a fifteen-year-old questioned without an attorney for five hours beginning at midnight). Close, who knew Taylor well, clearly believed the boy was telling the truth.

Further, that Taylor called Close immediately after being given access to a phone means that he had little time in which to fabricate a story with the specific, peculiar details he related, such as the fact that he asked for a lawyer and his mother, that a detective thrust a "187" ring in his face or that the same detective mapped out Taylor's potential fate on a sheet of paper. Moreover, Close's recollection that Taylor was "in tears and highly agitated," R.T. at 60, underscores how remote a possibility it is that Taylor had the time or mental clarity to calmly fabricate his tale before calling Close. Finally, the story Taylor told Close on September 2, 1993, was in all material respects the same story he told at the suppression hearing on August 17, 1994.

[7] We find it highly plausible that a frightened teenager would ask to speak with a lawyer he knew—or any lawyer—yet, when he is repeatedly denied the right to do so, would eventually give up hope, sign a waiver form and simply give the two adult authorities who stood between him and a phone call what they insisted on. That scenario is far more plausible than the prospect of a boy *not* asking for an attorney throughout his questioning—an attorney whose home phone number he knew by heart—confessing to murder, and then rushing to a phone to call the attorney, concocting an elaborate tale of police misconduct and feigning tears and agitation.

Remine's ambiguous assertions at the suppression hearing that he could not recall whether Taylor had requested counsel during questioning do not adequately contradict Taylor's and Close's testimony on this point. Moreover, even were we to construe Remine's ambiguous responses as affirmative denials that Taylor requested counsel, we would still credit Taylor's claims that he asked for an attorney, as corroborated by Close's virtually unquestioned testimony, over Remine's testimony.

We need not find that Remine perjured himself, although there is ample basis in the record for doing so—such as his repeated invocation of equivocal phrases such as "I don't recall" and "Not to my recollection." Rather, we can attribute Remine's watery testimony to the fallibility of human memory and to inherent limitations on Remine's observations in the early morning hours of September 2. *See Wiggins*, 123 S. Ct. at 2541 ("We are not accusing . . . [petitioner's lawyer] of lying."). Remine's recollection of the events of September 2 was less than flawless. For example, Remine initially testified that "[m]yself and Detective MacLyman" transported Taylor from his residence to the police station. R.T. at 11. When defense counsel pressed Remine on whether he had "a specific recollection of transporting him yourself?", Remine replied, "*I am almost positive* that's what happened." *Id.* (emphasis added). However, upon checking the record of transportation noted on Taylor's booking slip, Remine was forced to concede, "My mistake, Detective Dugan transported him." *Id.*

Remine was similarly unclear about the manner in which he and/or MacLyman advised Taylor of his *Miranda* rights. Inquiring about the procedure used to advise Taylor of his rights, defense counsel asked, "In this case did Mr. Taylor read it to himself, or did you read it to him?" *Id.* at 20. Remine replied, "*I don't recall which way it was.* I will say that we turned [it] around, and we read it to him. We turned it around and let him read it, and we read it to him while he

was reading it to himself." *Id.* (emphasis added). Defense counsel sought to clarify Remine's answer: "And do you have a specific recollection of doing that?" *Id.* Remine conceded, "No, sir[,] I do not." *Id.*

The prosecution subsequently asked Remine, "At the time that you presented [the legal advisement form] to Mr. Taylor, did you advise him of his rights?" *Id.* at 26. Remine hedged, "I think Detective MacLyman is the one that was going over the advisement with him." *Id.* The prosecution pressed, "But I want to make sure it is clear, in addition to having the rights presented to him in written form, were they *verbally* given to him?" *Id.* (emphasis added). Though he had previously stated that he could not remember whether Taylor was read his rights, Remine said unqualifiedly, "Yes, sir." *Id.* Such waffling on Remine's part is not entirely surprising, for he and MacLyman had interrogated Taylor on September 2, 1993, but Remine testified about those events nearly a year later on August 17, 1994. Remine had doubtless participated in other interrogations in the eleven months since he had questioned Taylor. Over time, and given intervening, unrelated events, Remine's memory could have faded or become confused.

Of course, recollections can be refreshed, *see* Cal. Evid. Code § 771; *cf. People* v. *Verodi*, 150 Cal. App. 2d 137, 148-50 (Ct. App. 1957) (proper for police officer to refresh his recollection of a conversation with defendant, using memorandum based on contemporaneous notes and dictated the day after the conversation), as was demonstrated when Remine consulted Taylor's booking slip and corrected his mistake about who transported Taylor to the police station. But it appears that Remine did not have his notes from the early morning interrogation to refresh his memory. *See* page 5897 & note 2 *supra*. He did not refer to them during his testimony at the suppression hearing, and at trial the next day, Remine admitted that he had thrown away his notes—which in itself is odd.

In addition to the potential detrimental effect of time on his memory, Remine was also inherently limited as a witness because he was not present during all the events to which Taylor testified. Remine was not with Taylor during his transportation to the police station when Taylor asked if his mother would be contacted, and he was not with Taylor during Taylor's arrival at the station and elevator ride to the third floor where the interrogation room was located.[13] Thus, Remine's one unambiguous denial to defense counsel that Taylor requested a lawyer—that Taylor did not ask for counsel *prior* to signing the advisement form at the start of questioning—does not contradict Close's testimony that Taylor asked to speak with Close while on the elevator. Further, although present for much of the interrogation, Remine was not with Taylor during the entire period of questioning. Remine explained in response to defense counsel questions that, while either he or MacLyman were with Taylor throughout the interrogation, there were times when one of them was absent:

> Q: And during this period of time, from 12 midnight until slightly after 3:00 o'clock, were both you and Detective MacLyman in the room with Mr. Taylor?
>
> A: One of us at all times, until the interview was concluded, and then I think we went and got the booking sheets and filled that out. But throughout the whole interview, one of us was with him at all times.
>
> Q: At some periods of time, you would leave the room; is that correct?
>
> A: Correct. Myself or Detective MacLyman but one of us would always remain there.

[13] Remine was either at Taylor's apartment executing the search warrant or was en route from there to the police station.

R.T. at 16.

Thus, Remine could not contradict Taylor's and Close's testimony about events that may have transpired out of Remine's presence. His absences particularly undercut the value of his testimony because he was not the primary wrongdoer in the misconduct described by Taylor—MacLyman was. Thus, Remine's testimony, even if truthful, doesn't persuasively bear on whether MacLyman, in Remine's absence, may have denied Taylor access to a phone.[14]

[8] These limitations on Remine's testimony are compounded by the fact that Remine was the *only* state witness at the suppression hearing. The prosecution could have filled the gaps in Remine's memory or ability to observe unfolding events by calling MacLyman to testify, or by calling the officer who transported Taylor and escorted him to the interrogation room. But it did not.[15] The detectives could have fully

[14] Taylor testified at the suppressing hearing that "one of the detectives" would not allow him to call Close. R.T. at 43. He couldn't recall which one it was.

[15] Juries may be instructed that failure of a party to bring forward a witness gives rise to the inference that the witness's testimony would have been unfavorable. *See* 1A Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 14.15, at 337-38 (5th ed. 2000) ("If it is peculiarly within the power of either the government or the defense to produce a witness who could give relevant testimony on an issue in the case, failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party."); *cf.* CALJIC 2.62 ("If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable."); *People* v. *Ford*, 45 Cal. 3d 431, 442-47 (1988). Similarly, it would be a fair inference here that the testimony of MacLyman and the officer who escorted Taylor would have been unfavorable to the state, since the state—despite the gaps in Remine's testimony—did not call either as a witness. We need not rely on this inference, however; it suffices that Remine's testimony does not adequately refute Taylor's and Close's.

documented the interrogation by taping it in its entirety or preserving notes of the session. But they did not. Thus, we are compelled to weigh Remine's inherently incomplete and somewhat confused testimony against Taylor's precise account of police misconduct, an account that remained consistent over the course of about a year, and Close's highly corroborative testimony.

Of course, our concerns with Remine's testimony cannot provide the basis for a conclusion that there is clear and convincing evidence in the record of police misconduct.[16] But the confusion Remine evinced in his recollection of September 2 and the fact that he was not present during all of the events in question inherently limit the extent to which his testimony can contradict—and thereby rebut—Taylor's and Close's accounts. As noted, Close's testimony suffered none of the shortcomings of Remine's. *See* pages 5923-25 *supra*. We have also closely examined Taylor's testimony at the suppression hearing and, although he was not as polished a witness as attorney Close, his testimony was clear, direct, consistent and unequivocal—and remained unshaken on cross.

In evaluating the relative credibility of Taylor and Remine, we also cannot avoid considering the circumstances under which this interrogation took place. For reasons not disclosed on the record, the two detectives executed the search and arrest warrants just before midnight, rather than at a more appropriate hour. The crime in question had occurred many weeks earlier, so the officers were hardly in hot pursuit. And

[16] Section 2254(e)(1) provides that petitioner must rebut the presumption of correctness with clear and convincing evidence. Where, as here, the presumption does not attach, it may be more appropriate to require petitioner to prove his factual contentions by a preponderance of the evidence. *Cf. Silva* v. *Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (petitioner bears burden of proving he merits habeas relief by the preponderance of the evidence). For present purposes, however, we evaluate his factual claims under the stringent clear-and-convincing standard normally required of habeas petitioners.

there is no indication that Taylor was aware he was under suspicion and would attempt to flee the jurisdiction. To the contrary, he was found in his home, sleeping.

The detectives knew Taylor was sixteen. Yet, having arrested Taylor in the middle of the night, and having found him in his home without a parent present, they chose to conduct the interrogation immediately and to carry it on until they got a confession. There is no evidence that the detectives attempted to locate Taylor's mother, nor any suggestion as to the existence of an exigency that required that Taylor be arrested and interrogated at a time when his defenses and ability to think straight were weakened by the lateness of the hour, the absence of a parent and the inherent intimidation of the circumstances. Commencing the interrogation of a teenager after midnight, and pressing it past 3:00 a.m., absent some showing that delay would risk the destruction of evidence or other such harm, creates far too great a risk that a false confession will be extracted, leading to the unjust conviction of an innocent person. *See Haley*, 332 U.S. at 599 (An adolescent "cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . . A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition."). Moreover, the very fact that the detectives chose to conduct their interrogation of Taylor in such circumstances, rather than waiting until he had an opportunity to rest and contact his mother, lends plausibility to Taylor's claim that the detectives engaged in hard-ball tactics to get him to confess before he had a chance to seek the advice of an adult as to how he should proceed. By their unjustified and distasteful actions, Detectives MacLyman and Remine lent credence to Taylor's account of what happened during the three hours that he was trapped by them in the interrogation room.[17]

[17] We note in passing that police misconduct is not unknown in the Long Beach Police Department. We recently affirmed the grant of habeas relief

[9] We find clear and convincing evidence in the record that Taylor, during questioning, asked to speak with a lawyer and with his mother more than once before inculpating himself; that these requests went unheeded; that MacLyman brandished his ring in Taylor's face; and that MacLyman threateningly mapped the potential consequences for Taylor if he did not confess, in a disingenuous effort to persuade Taylor that persisting in his denials would cost him dearly, and the only way to avoid a life sentence would be for him to fess up.

[10] Because neither the state trial court nor the court of appeal discussed Close's testimony in ruling Taylor's confession admissible, they made no finding as to whether Taylor invoked his right to counsel *prior* to the start of questioning. It is well-established that when the state courts do not make findings at all, no presumption of correctness attaches, and we must make our own findings. *See Wiggins*, 123 S. Ct. at 2540. We therefore find that Taylor also requested counsel prior to the start of questioning. Taylor testified that he took an elevator to the floor where the interrogation room was located. Close testified that Taylor said he had requested to speak with Close on the elevator in the police station prior to questioning. While the degree of correspondence between Close's testimony and Taylor's is not as exact here as in other instances, the corroboration of the elevator detail—in the context of other points of corroboration—is sufficient proof that Taylor

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to petitioner Thomas Goldstein, who was convicted in 1980 of first-degree murder. *See* Judgment & Order, No. CV 98-5035-DT (C.D. Cal. Dec. 27, 2002), *aff'd* 82 Fed. Appx. 592 (9th Cir. 2003). Habeas relief was granted because the prosecution failed to disclose to Goldstein that Long Beach officers had struck a deal with an informant, who provided critical testimony against Goldstein at trial; that they were impermissibly suggestive in handling the photographic identification of Goldstein by the only eyewitness to the murder; and that they advised the eyewitness not to retake the stand after he had misgivings about his recognition of Goldstein. Among the officers investigating Goldstein for the murder was Detective William MacLyman. R.T., *People* v. *Goldstein*, Case No. A020746 (L.A. Cty. Super. Ct.), at 603-04.

invoked counsel at that time. Indeed, since the officer who transported Taylor to the interrogation room and to whom Taylor's request was directed, did not testify, Taylor's account on this point is wholly uncontradicted.[18]

[11] 6. In light of our findings, it follows that the court of appeal's conclusion that Taylor's confession was obtained in a constitutionally acceptable manner, and thus was admissible at trial, was an objectively unreasonable application of Supreme Court precedent.

[12] Because Taylor asked to speak with counsel prior to the start of questioning, the detectives should never have started their custodial interrogation at all. That Taylor's request in the elevator was made to another officer, apparently Detective Dugan, makes no difference. Detective Dugan, or whoever escorted Taylor up the elevator, was required to advise other officers that the suspect had invoked his right to counsel and thus could not be questioned until he had talked to a lawyer. *Cf. Arizona* v. *Roberson*, 486 U.S. 675, 687-88 (1988). Subsequently, during questioning, the detectives should have immediately ceased custodial interrogation upon hearing Taylor's repeated requests that he be allowed to call a lawyer while he was in the interview room. *See Miranda*, 384 U.S. at 444-45. They did not. Taylor's inculpatory statements were therefore taken in violation of *Miranda*, and their admission during the prosecution's case-in-chief violated Taylor's clearly-established rights under the Fifth and Fourteenth Amendments. *See Edwards*, 451 U.S. at 486-87. That the detectives may have administered *Miranda* warnings to Taylor at the start of questioning[19] and again on the tape-recording is of no consequence.[20] As the Supreme Court explained in *Edwards*,

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[18] *See also* note 15 *supra*.

[19] In light of our following discussion, we need not address Taylor's argument that his waiver, at least at the start of questioning, was not voluntary, knowing and intelligent.

[20] Although we analyze the second administration of rights as distinct from the first, we doubt that the second could be construed as a separate

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation *even if he has been advised of his rights*. . . . [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85 (emphasis added) (footnote omitted); *see also Roberson*, 486 U.S. at 680-81.

[13] Taylor's confession was also inadmissible because it was not voluntarily given. Whether a confession is voluntary is determined under the totality of the circumstances, which include "the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." *Withrow* v. *Williams*, 507 U.S. 680, 693 (1993) (citations omitted). Sixteen-year-old Taylor was interrogated for roughly three hours in the middle of the night, without an attorney or parent. The record indicates that he had been arrested in the past but that he had never even been charged

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advisement. The record indicates that there were no significant breaks in the chain of events leading to Taylor's initial inculpatory statement and the tape-recording of the confession. The recorded waiver was couched entirely in the past tense and only memorialized the first. *See, e.g.*, R.T. of Exh. 9 (confession) at 1 ("I showed you a form and read you a form that's called an advisement of legal rights form; is that correct?"). *Cf. Collazo* v. *Estelle*, 940 F.2d 411, 421-23 (9th Cir. 1991) (en banc) (advisement conducted in past tense and referencing previous advisement effectively continued an earlier session of questioning that had terminated three hours before).

with an offense or put on informal probation. While Taylor's prior encounters with law enforcement and the advisement of his *Miranda* rights favor the state's position that he confessed voluntarily, *cf. Fare* v. *Michael C.*, 442 U.S. 707, 726-27 (1979), Taylor's relative youth, the time of night when he was questioned, the length of the interrogation, the absence of an attorney or parent, the fact that he "was given no food, offered no rest break, and may or may not have been given any water," Ct. App. Opin. at 6, and the denial of his requests to speak with his mother suggest otherwise, *see Haley*, 332 U.S. at 600. That MacLyman threatened Taylor by jabbing his ring in Taylor's face and diagramming a grim future if Taylor did not confess, convinces us that the boy's will was overborne. *Cf. Collazo* v. *Estelle*, 940 F.2d 411, 427 (9th Cir. 1991) (en banc) (Kozinski, J., concurring) ("We cannot allow police to advise suspects that they will pay dearly for taking advantage of their right to counsel . . . ."). That Taylor was denied access to a telephone in order to contact his lawyer merely confirms what we readily find based on the other evidence: These detectives were simply not going to play by the rules. We find that the detectives' coercive and constitutionally unacceptable misconduct overbore Taylor's free will, rendering his confession involuntary.

7. Admission of Taylor's confession was trial error rather than structural error. *See Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991); *Ghent* v. *Woodford*, 279 F.3d 1121, 1126 (9th Cir. 2002). Because the court of appeal found the confession admissible, it did not conduct harmless-error analysis. We must therefore review the evidence at trial to determine whether the confession likely had a substantial and injurious impact on the verdict; if not, its admission was harmless. *See Brecht* v. *Abrahamson*, 507 U.S. 619, 637-39 (1993); *Bains* v. *Cambra*, 204 F.3d 964, 977 (9th Cir. 2000).

Shadden was riding his bicycle near the beach when two young males, one taller, the other shorter, grabbed his bicycle and tried to take it from him. Shadden resisted and gave chase

on foot, pursuing the taller boy. The latter apparently shot Shadden while running away from him, fatally hitting him twice from a distance of at least two feet.

The main issue at Taylor's trial was identity, as the prosecution sought to prove that Taylor was the taller boy who had shot Shadden. Of two witnesses to the crime and its immediate aftermath, only one, Gerald Ofhgang, had seen the taller boy, and his best look was from twenty-five feet away while driving at night. Ofhgang had initially identified both boys as Hispanic. Ofhgang did identify the shorter boy from a photograph as an individual named Victor Rodriguez, but he couldn't identify Taylor as the taller boy. And, as the record reflects, Taylor is not Hispanic.

Another state witness, Ana Bonilla, said she, her boyfriend and other teenage boys—some of them Hispanic—had been driving around the beach area in a van on the night of the killing. She testified that she had seen Taylor in possession of a gun on a prior occasion but did not specify how long before Shadden's killing. In addition, Bonilla testified that Taylor and Victor Rodriguez entered the van in the vicinity of the crime scene, after which she heard someone say that a person either had been or would be killed; she also heard someone say something about urinating on his hands. She could not attribute these vague murmurings to a specific individual in the van.

Detective Remine then testified and contradicted Bonilla. Bonilla had apparently approached the police in response to a reward program publicizing the crime and, according to Remine, told the police on that previous occasion that it was Taylor who had spoken and that it was Taylor who said he had killed someone and asked a friend to urinate on his hands.[21]

[21] Remine explained in his trial testimony that the urine would have rendered ineffective any test for gunpowder residue.

Remine testified that Bonilla had hesitated before identifying Taylor as the speaker.

Of all of this testimonial evidence, only Bonilla's hearsay statements, as related by Remine, linked Taylor to Shadden's killing, and Bonilla contradicted those statements in her trial testimony. But Bonilla's testimony did place Taylor near the area where Shadden was killed on the night he was killed, and confirmed that Taylor had a gun at some point in the past, though not necessarily on the night of the killing. Other than Bonilla's hearsay and testimony, however, the state presented nothing to prove that Taylor killed Shadden. The gun used to shoot Shadden was never found, and the prosecution presented no fingerprints, footprints or other physical evidence linking Taylor to the crime.

Defense counsel was permitted to argue to the jury that the confession was false and that the circumstances of his questioning had intimidated Taylor into giving it. But the jury did not hear Close's testimony about Taylor's phone call to him because that testimony was excluded by the trial court, a ruling upheld by the court of appeal. *See* page 5914 *supra*. The jury was thus left in the dark about the fact that Taylor had recanted his confession shortly after he made it, that he was in tears and agitated and that his story at trial closely matched the account of the interrogation he had given to Close at the time. Defense counsel also called a clinical psychologist to the stand, who testified that Taylor has verbal skills and a total IQ near the low end of the average range.

In determining whether error was harmless, we do "not examine whether there was sufficient evidence to support the conviction in the absence of the constitutional error." *Ghent*, 279 F.3d at 1127. Rather, we determine "whether the error had a 'substantial and injurious effect or influence' " on the jury verdict. *Id.* (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). Here, it surely did. There was no physical evidence linking Taylor to the crime and no eyewitness to the

incident that could identify him as the assailant, and Bonilla's trial testimony contradicted her hearsay statements. The only solid evidence against Taylor was the eleven-minute taped confession that was extracted from him in the wee hours of September 2, 1993. Moreover, we are mindful of the Supreme Court's admonition as to the devastating power of confessions:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States*, 391 U.S., at 139-40, 88 S.Ct., at 1630 (White, J., dissenting). See also *Cruz v. New York*, 481 U.S., at 195, 107 S.Ct., at 1720 (White, J., dissenting) (citing *Bruton*) . . . . [A] full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Fulminante, 499 U.S. at 296 (first two alterations in original).

[14] Given the paper-thin evidence implicating Taylor, we have no choice but to conclude that the eleven-minute recording played to the jury likely had a substantial and injurious impact on its verdict. Admission of the confession was not harmless.

* * *

[15] The magistrate's report and recommendation adopted by the district court concluded that Taylor did not rebut the

presumption of correctness and did not demonstrate that the state courts' determinations were objectively unreasonable. Based on our independent review of the record, we conclude the district court erred. Taylor is entitled to habeas relief. We therefore REVERSE the decision of the district court and REMAND with instructions to GRANT a conditional writ of habeas corpus, ordering Taylor's release unless the state of California notifies the district court within thirty days of the issuance of this court's mandate that it intends to re-try Taylor based on evidence other than the illegally-obtained confession, and actually commences Taylor's re-trial within seventy days of issuance of the mandate.

APPENDIX

DIRECT EXAMINATION

BY MR. SCHMOCKER [defense counsel]:

Q: Sir, how are you employed?

A: An attorney, self-employed.

Q: And are you licensed to practice in the state of California?

A: Yes, I am.

Q: Directing your attention back to the early morning hours of September second, 1993, did you receive a phone call?

A: Yes, I did.

Q: About what time did you receive a phone call?

A: Approximately four a.m.

Q: And who did you receive a phone call from?

A: Leif Taylor.

Q: And do you recognize Mr. Taylor in the courtroom today?

A: He is present at counsel table, sitting at the end of counsel table, in a white, short sleeve shirt.

MR. SCHMOCKER: May the record indicate—

THE COURT: Yes, that's the defendant, Mr. Taylor.

MR. SCHMOCKER: Thank you.

Q BY MR. SCHMOCKER: Had you known Mr. Taylor prior to September second, 1993?

A: For approximately a year or so prior to that.

Q: And how did you know him?

MR. LAMB [prosecution]: Objection, your honor, none of this is relevant.

THE COURT: I will allow that question.

THE WITNESS: I known [sic] him from clean up of the community, and graffiti clean up, as well as the probation department and a gang baseball team and doing chores in the neighborhood for me and for other people in the neighborhood.

Q: Had you ever provided your card to Mr. Taylor?

A: Yes, I had.

Q: And had you, in a personal discussion with him, offered your services if he ever needed them?

A: Yes.

Q: And on your card, does it, does your card contain not only your business number but other telephone numbers in order to reach you?

A: It has my home number, and a fax number.

Q: And when you were contacted at around four o'clock in the morning on September second, upon which phone line were you contacted?

A: On my home line.

Q: When you received that conversation, that telephone call, had—did you hear, did you actually hear Leif Taylor's voice?

A: Yes, I did.

Q: And how long did that conversation last?

A: Probably five minutes.

Q: During the course of that conversation, let me ask you this.
You had spoken with Mr. Taylor previous to that occasion?

A: Many times, yes.

Q: And can you, from the tone of his voice, could you—can you tell us anything, could you tell us about the tone of his voice, then, on September second, 1993?

A: He was in tears and highly agitated.

Q: And when you received the phone call, what is the first thing that Mr. Taylor told you?

A: He told me that he had just confessed to the police that he had committed a murder.

Q: And did you respond to that?

A: Well, when he told me that, it was a continuous dialogue on his part. He told me that he had confessed because he had asked to talk to an attorney, and talk to his mother, and that he had been interro-

gated for some four hours, and the only reason he confessed was so he could make the phone call.

THE COURT: Just a minute. Is this all right, that your attorney gives all this testimony, because it would otherwise be confidential; is that okay with you?

THE DEFENDANT: Yes, that's okay with me.

MR. SCHMOCKER: It is, your honor.

THE COURT: Thank you.

Q BY MR. SCHMOCKER: And when he finished, so he told you that the reason that he confessed; is that correct?

A: Yes.

Q: Did he tell you anything else about that confession?

A: He said that during the confession, one of the officers kept pushing a diamond ring with the numbers 187 in his face, and drew a diagram of two different routes of what would happen to him. One route if he cooperated and confessed, the other route that if he refused to do so, and what the consequences would be.

Q: And what were the consequences, if he confessed?

A: I don't know. He wouldn't tell me. Just that a map was drawn in front of him, giving two possible alternatives, to whether or not he cooperated and confessed.

Q: And did he tell you when it is that he requested a lawyer?

A: He said he requested, by name, to speak to me on the elevator in the police department, prior to the questioning.

Q: And did he say whether or not he repeated that request during the interrogation?

A: He said at least four times, he asked to have his lawyer present, and he also asked to have his mother present.

Q: And during the course of this conversation, did he ask you for your advice?

A: I told him to say nothing. That the court would appoint an attorney to represent him. To tell the police officers, if they question him any further, that he wanted to have a court-appointed lawyer on his behalf, and that I would not be able to represent him because I would probably be a witness.

MR. SCHMOCKER: Your honor, may I have just one moment?

Q BY MR. SCHMOCKER: Did he tell you how he felt before he made this statement to the police?

A: No.

MR. SCHMOCKER: Nothing further.

THE COURT: Mr. Lamb.

CROSS EXAMINATION

BY MR. LAMB: Thank you, your honor.

Q: Mr. Close, I am not quite clear, did he tell you "I lied to the police and confessed to them," or did he tell you "I confessed?"

A: No, he adamantly insisted he didn't do it, but the only reason he confessed was because he was desirous of making a phone call to his lawyer and his mother. He said that was the reason for the confession.

MR. LAMB: No further questions, your honor.

THE COURT: Anything, Mr. Schmocker?

MR. SCHMOCKER: No, your honor. Nothing further.

THE COURT: Sir, thank you for coming in from Whittier. You are free to go.

R.T. at 58-63.

APPENDIX B

FILED
JUN 4 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEIF TAYLOR,	)	No. CV 97-7033-RJK (MAN)
	)	
Petitioner,	)	**REPORT AND**
	)	**RECOMMENDATION OF**
v.	)	**UNITED STATES**
	)	**MAGISTRATE JUDGE**
THOMAS MADDOX,	)	
Interim Director,	)	
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to the Honorable Robert J. Kelleher, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a California state prisoner proceeding *pro se*, filed a "Petition For Writ Of Habeas Corpus By A Person In State Custody," pursuant to 28 U.S.C. § 2254, on September 23, 1997 ("Petition"). On January 30, 1998, Respondent filed a Return to the Petition. On November 5, 1998, Petitioner filed a "Request for Stay of Petition," seeking a stay of this action while he exhausted certain allegedly newly-discovered claims not included in the Petition. On November 9, 1998, the Court granted Petitioner's Request, and ordered that this action be

stayed while Petitioner pursued exhaustion, and directed Petitioner to file a motion for leave to amend and a proposed First Amended Petition once exhaustion was completed.

Subsequently, the Court requested, and received from Petitioner, periodic status reports regarding his exhaustion efforts. On March 6, 2000, Petitioner submitted his proposed First Amended Petition and a motion for leave to amend. Following briefing, on May 16, 2000, the Court issued an order denying the motion for leave to amend because certain issues raised within Ground Two of the proposed First Amended Petition were unexhausted (i.e., a claim of instructional error). On June 2, 2000, the Court granted Petitioner's request to strike the unexhausted instructional error claim from Ground Two and ordered that the proposed First Amended Petition be filed ("Amended Petition"). On August 31, 2000, Respondent filed a Return to the Amended Petition ("Return"). On November 2, 2000, Petitioner filed his Traverse.

The matter is now submitted and ready for decision. Having reviewed the allegations of the Amended Petition and the matters set forth in the Return, the Traverse, and the record, it is recommended that the Amended Petition be denied and dismissed with prejudice.

PRIOR PROCEEDINGS

Following a state court jury trial, Petitioner was convicted of first degree murder and second degree robbery. (Clerk's Transcript ("CT") 101-02; California Penal Code §§ 187(a) and 211.) The jury also found that Petitioner had used a firearm in the commission of the offenses and that the murder was committed during the commission of the robbery. (CT 101-02; California Penal Code §§ 190.2(a)(17) and 12022.5(a)) The trial court sentenced Petitioner to state prison for a term of life without the possibility of parole. (CT 136.)

Petitioner appealed his conviction to the California Court of Appeal which, in an unpublished opinion filed on December 6, 1996, affirmed the trial court's judgment in full. (Return, Ex.

C.) Petitioner then filed a petition for review in the California Supreme Court, which denied the petition, without comment or citation to authority, on March 12, 1997. (Return, Exs. D and E.) On June 16, 1999, while this action was stayed, Petitioner filed a habeas petition with the California Supreme Court. (Return, Ex. F.) That court denied the habeas petition on September 29, 1999, with citations to In re Waltreus, 62 Cal. 2d 218, 225 (1965), In re Lindley, 29 Cal. 2d 709, 723 (1947), and In re Dixon, 41 Cal. 2d 756, 759 (1953). (Return, Ex. G.)

SUMMARY OF EVIDENCE AT TRIAL

The Amended Petition raises, *inter alia*, a claim of insufficiency of the evidence. The disposition of this claim requires a detailed recitation of the facts of the case. The record contains the following evidence.[1]

The Prosecution Evidence:

The Murder And Robbery

In the late evening hours of May 31, 1993, Gerald Ofhgang was driving his truck along Ocean Boulevard in Long Beach, when he observed three young men. Two of the men, who appeared to be light-skinned Hispanic males between the ages of 14 to 17 years old, appeared to be attempting to shake a bicyclist (William Shadden) off his bicycle. One of the Hispanic males was about 5'6" tall, while the other was 5'9". The two Hispanic men forced the bicyclist to stop, by grabbing the bicycle's handles. (Reporter's Transcript ("RT") 97-100, 121-24.) The two Hispanic men knocked Shadden off the bicycle. The taller Hispanic man ran up the sidewalk, and Shadden chased him. The other, shorter, Hispanic man also ran in the same direction but doubled back and again attempted to

[1] The California Court of Appeal made factual findings in its opinion on direct appeal (Return, Ex. C ("State Decision")) which, as discussed *infra*, are entitled to deference. In addition, the Court has independently reviewed the record of Petitioner's trial.

take the bicycle. When the shorter Hispanic man saw Ofhgang slowly approaching in his truck, he dropped the bicycle and ran away. (RT 99-103, 109-110; State Decision at 128-29.)

Ofhgang parked his truck and gathered up Shadden's bicycle as well as his belongings, which had spilled onto the street. He carried them to the corner and waited for Shadden to return. After a moment, Ofhgang discovered Shadden's body approximately 12-13 feet away, partially obscured by iceplant. (RT 103, 110-11; State Decision at 129.)[2]

That same night, at approximately 11:20 p.m., Debra Gray was sleeping in her residence, near Ocean Boulevard, when she was awakened by the sound of gunshots. Gray opened her front door and looked outside. She saw a young, short Hispanic male attempting to pick up a bicycle, who then ran away. She also observed a man in a truck. Before he ran away, Gray heard the Hispanic male say either "We got the fucker" or "We shot the fucker." (RT 79-81, 86-95; State Decision at 128.)

That same night, Ana Bonilla was sitting in a van, which was parked near Ocean Boulevard and La Verne Street in Long Beach. Petitioner, who was 16 years old at the time, and Victor Rodriguez entered the van. Bonilla heard Petitioner and Rodriguez talk about "something" that "had to do with killing or someone was going to be killed." Bonilla testified that Petitioner "could have been" the one who made that statement. Bonilla also heard someone say, "pee on my hand." (RT 138-141, 157-58; State Decision at 129.)[3] Bonilla recalled that she had seen Petitioner in possession of a firearm on a prior occasion.[4] (RT 141.)

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[2] Autopsy results indicated that Shadden died as a result of two gunshot wounds - - one to his chest and the other to his left shoulder. The coroner testified that, due to the absence of sooting or tattooing around the wounds, the gun had been fired from a distance of greater than two feet away. (RT 128-30; State Decision at 129.)

[3] According to Long Beach Detective Craig Remine, urination will wash off gunshot residue, which makes testing for such residue impossible. (RT 209; State Decision at 130.)

[4] Bonilla had heard about a reward for information concerning Shadden's murder. She was interviewed by Detective Remine. (State Decision at 129.)

On September 1, 1993, at approximately 11:30 p.m., Petitioner was arrested at his residence. No gun was found during a search of the residence. (RT 180-84, 200.)

Petitioner's Confession

On September 2, 1993, from approximately 12:20 a.m. to approximately 3:13 a.m., Detective Remine and another detective interviewed Petitioner at the Long Beach police station. At the beginning of the interview, Detective Remine advised Petitioner of his Miranda[5] rights. (RT 168-170.) Specifically, the detective advised Petitioner of, and showed him a form which listed, the following rights: (a) he had the right to remain silent; (2) his statements could be used against him in court; (3) he had a right to talk to an attorney and to have the attorney present during the interview; and (d) he had a right to the appointment of an attorney if he could not afford to hire one. Petitioner stated that he understood these rights and signed the form, acknowledging his understanding and waiving his rights. The two detectives also signed the form. (RT 170-72.)

At first, Petitioner denied that he had been in the area of the murder on the night of Shadden's murder. However, when Detective Remine said that he had information indicating that Petitioner was lying, Petitioner acknowledged that he went to Ocean Boulevard with some other people in a van on the night of the murder. Petitioner stated that some of the other people left the van and tried to steal a bicycle. When they returned to the van, Petitioner heard one of them say that he had shot the owner of the bicycle. (RT 174, 204.)

Petitioner then changed his story. Petitioner described how Rodriguez and another person earlier had stolen a bicycle from the back of a parked van. Afterwards, while the van was moving, Petitioner and the others saw a bicyclist. The van drove down the street and made a U-turn, and Petitioner and Rodriguez exited the van. Petitioner had a .22 caliber handgun

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[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

with him at the time.[6] When Shadden reached them, they tried to steal Shadden's bicycle by grabbing the bicycle as Shadden was riding. Shadden got off the bicycle and ran after Rodriguez. Rodriguez tried to spray Shadden with some mace but was unsuccessful. Shadden then chased after Petitioner. As Shadden got closer and was about to grab Petitioner, Petitioner became afraid. Petitioner pulled out his gun, stuck it under his left arm, and fired off two shots. (RT 175-76; Confession Transcript at 370-72, 376-79.) Shadden turned around and started to chase Rodriguez. Petitioner ran back to the van and got inside. (RT 176-77; Confession Transcript at 373-74; State Decision at 130-31.)

According to Detective Remine, aside from appearing tired, Petitioner did not cry, was not frightened, and did not express any emotion during the interview. (RT 193; State Decision at 130.)[7]

The Defense Evidence:

Petitioner did not testify. The defense presented a clinical psychologist, Marsha Mills, who testified that, based upon his performance on a Wexler Adult Intelligence Scale exam, Petitioner possessed "low average" verbal skills and "average" intellectual ability. (RT 228-29.) Petitioner's school achievement test scores indicated that Petitioner was performing at the bottom 5 to 24 percentile of his grade level. (RT 232-33.)

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[6] At trial, the jury heard an eleven-minute tape recording of Petitioner's confession. (RT 173-74, 177, 193.) Specifically, at the beginning of the recording, the jury heard a detective read Petitioner his Miranda rights from an advisory form. The jury also heard Petitioner acknowledge that he had initialed and signed the form, which stated, *inter alia*, "Any statement I make at this time is free and voluntary, no promise of any reward." (Return, Ex. H (Transcript of Petitioner's Confession on September 2, 1993 ("Confession Transcript") at 369.)

[7] On cross-examination, Detective Remine testified that Petitioner was physically smaller than either of the detectives and was given no food or rest break, and may or may not have been offered water. (State Decision at 131.)

On cross-examination, Mills acknowledged that Petitioner could recognize and acknowledge when his actions were wrong and possessed the capacity to admit to his crime, assuming he had committed one. (RT 235-36.) Additionally, Mills acknowledged that Petitioner possessed the mental capacity to understand his Miranda warning and to waive his rights. (RT 242-43; State Decision at 132.)

PETITIONER'S CONTENTIONS

1. The admission of Petitioner's confession at his trial violated the Fifth Amendment, as his Miranda waiver and confession were involuntary. (Amended Petition at 6.)
2. Petitioner's federal constitutional rights were violated when the trial court admitted Petitioner's confession but precluded the admission of hearsay evidence of Petitioner's mental state at the time of his confession. (Amended Petition at 6.)
3. Petitioner's federal constitutional rights were violated when: (a) the trial court failed to instruct the jury on lesser included offenses and failed to properly instruct the jury on the elements of the charged crimes; and (b) he was convicted based upon insufficient evidence. (Amended Petition at 7.)
4. Petitioner's sentence is cruel and unusual punishment in violation of the Eighth Amendment in light of Petitioner's personal circumstances and the circumstances of the crime. (Amended Petition at 7.)

STANDARD OF REVIEW

This action, filed in this Court on September 23, 1997, is subject to the amendments to the federal habeas corpus statutes contained in the Antiterrorism and Effective Death Penalty Act, effective April 24, 1996 ("AEDPA"). See Duhaime v. Ducharme, 200 F.3d 597, 600 n.3 (9th Cir. 2000) (a habeas

petition filed after April 24, 1996, is governed by 28 U.S.C. § 2254, as amended by the AEDPA).

A. The AEDPA Requirements.

Federal habeas corpus relief is available to a state prisoner only if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241, 2254. The AEDPA imposes additional restrictions on the granting of habeas relief to state prisoners with respect to any claim adjudicated on the merits in state court. In such circumstances, the writ "shall not be granted" unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). See also Williams v. Taylor, 529 U.S. 362, 405-11, 120 S. Ct. 1495, 1519-22 (2000).

It is clear that a state court decision cannot be overturned on federal habeas review merely because it conflicts with Ninth Circuit precedent on a federal constitutional issue. The Supreme Court in Williams conclusively opined that "§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." 120 S. Ct. at 1523. See also Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir.) ("the only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court"), cert. denied, __ U.S. __, 121 S. Ct. 340 (2000).

In reviewing the habeas petition, "[a] federal court must presume the correctness of the state court's factual findings." Bains v. Cambra, 204 F.3d 964, 972 (9th Cir.), cert. denied, __

U.S. __, 121 S. Ct. 627 (2000). The petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1).

Finally, a habeas petitioner is not entitled to relief as a result of a trial error unless the record demonstrates that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). In other words, the petitioner is not entitled to habeas relief unless he can establish that the alleged error resulted in "actual prejudice." Id.

B. Application Of The AEDPA To The Present Proceedings.

Petitioner raised the claims which he asserts in Grounds 1, 2, 3 (first subclaim only, i.e., the instructional error claim), and 4 of the present Amended Petition in his direct appeal before the California Court of Appeal. (Compare Amended Petition at 6-7 with Return, Ex. B.) The California Court of Appeal reached the merits of these claims when, through the State Decision, it issued a written, reasoned decision addressing each claim. (Return, Ex. C.) The California Supreme Court also reached the merits of these claims when it denied Petitioner's petition for review without comment or citation to authority. See Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992). Accordingly, to determine the reasonableness of the California Supreme Court's decision on these claims, this Court must analyze the written opinion of the California Court of Appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594 (1991) ("where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting that same claim rest upon the same ground"). Thus, in conducting habeas review of the above-noted claims, this Court must apply the deferential standards of review articulated in 28 U.S.C. § 2254(d).

Petitioner raised the second subclaim of Ground 3 -- his sufficiency of the evidence claim -- through his habeas petition filed with the California Supreme Court in 1999. The California Supreme Court apparently denied that habeas petition on procedural grounds, given the citations indicated in the court's otherwise silent denial order. (Return, Ex. G.) In light of the nature of the state high court's denial of this claim, there is no basis to review that court's "application" of federal law under 28 U.S.C. § 2254(d). See Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000). Thus, although *de novo* review of this claim is not required under the AEDPA, this Court must conduct "an independent review of the record . . . to determine whether the state court clearly erred in its application of controlling federal law." Id. at 982.

II. The State Courts Did Not Err In Finding Petitioner's Confession To Be Voluntary.

In his first claim, Petitioner argues that his Miranda waiver and his confession were involuntary and, therefore, the admission of his confession violated the Fifth Amendment. (Amended Petition at 6.)

A. Applicable Law.

The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. The Unites States Supreme Court, in Miranda, held that the Fifth Amendment privilege against self-incrimination bars the prosecution from using statements stemming from custodial interrogation unless the defendant was first warned of his constitutional rights. See Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528-29 (1994). The Miranda safeguards apply when law enforcement officials initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Miranda, 384 U.S. at 444, 86 S.

Ct. at 1612; see Stansbury, 511 U.S. at 322, 114 S. Ct. at 1528. However, the police can interrogate a suspect if he or she voluntarily, knowingly, and intelligently waives his or her constitutional rights. Patterson v. Illinois, 487 U.S. 285, 292, 108 S. Ct. 2389, 2394-95; Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1140-41 (1986).

Recently, in Dickerson v. United States, 530 U.S. 428, 432, 120 S. Ct. 2326, 2331 (2000), the United States Supreme Court confirmed that Miranda and its progeny continue to govern the admissibility of statements made by a criminal defendant while in police custody. The Court reaffirmed that such statements are admissible only if the defendant was first warned that he has "'the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that is he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (quoting from Miranda, 384 U.S. at 479, 86 S. Ct. at 1630.)

A criminal suspect, however, need not "know and understand every possible consequence of a waiver of the Fifth Amendment privilege," but need only understand that "he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." Colorado v. Spring, 479 U.S. 564, 574, 107 S. Ct. 851, 857 (1987) (citations omitted).

B. The Suppression Hearing.

Prior to trial, Petitioner moved to suppress his confession. (RT 5.) The trial court conducted an evidentiary hearing, pursuant to California Evidence Code § 402, to determine whether Petitioner's confession should be suppressed on the ground that he had been coerced into making it. Detective Remine, Petitioner and Arthur Close, an attorney whom Petitioner called from the police station following his confession, testified at the hearing. (RT 5-71.)

According to Detective Remine, at the beginning of the interview, he advised Petitioner of his Miranda rights. Petitioner was shown, and had read verbally to him, an advisement form listing his Miranda rights, which he signed. The detectives also signed the form. Petitioner stated that he understood his rights and that he waived them. (RT 17-21, 26-27.)[8] Neither Petitioner's parents nor his attorney were present during the interview. At no time during the interview did Petitioner cry, sleep, ask to speak to his mother, ask to use a telephone or ask for permission to call his attorney. (RT 15-17, 21, 25.) Petitioner told the detectives two different stories. The detectives obtained Petitioner's permission to tape record the second story, in which Petitioner confessed to Shadden's murder. (RT 17-18.) Before taping the interview, the detectives again went over the advisement of legal rights form with Petitioner. The tape of that additional advisement was played at the suppression hearing. (RT 27-28.)

According to Petitioner's testimony at the suppression hearing, as he was being transported to the police station, he asked if he could call his mother when they arrived and was told that she would be notified for him. (RT 32.) Petitioner was left alone in the interview room for 20 minutes prior to being interviewed by the two detectives. Once the detectives entered the room, when Petitioner inquired what he had been arrested for, the detectives said "you know" and one of them showed him a ring with the number "187." Petitioner was confused and did not understand what was happening. Petitioner was told that he had been arrested on the charge of murder. (RT 33-35.) Shortly thereafter, Petitioner asked to speak to an attorney for advice. The detectives told him that "it wouldn't be possible" to do so. (RT 35, 40-43.) Petitioner then asked to speak to his mother. Again he was told that he could not do so. (RT 36.)

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[8] At the January 12, 1994 preliminary hearing, Detective William MacLyman read into the record the text of the advisement form provided to and initialed by Petitioner, which states each of the Miranda rights. (CT 8-9.)

Petitioner testified that Detective Remine's partner drew a short line on a piece of paper and then said, "if you keep telling us you didn't do it, you are going to jail for the rest of your life," and drew a long line. (RT 43-45.) Petitioner claimed that the detectives left the interview room several times, leaving him alone in the room for up to 40 minutes. (RT 45.)[9] Petitioner felt tired, scared, and sleepy, and was not offered any food or drink. (RT 46.) Petitioner wanted to use the phone to call his mother or a lawyer but the detectives kept telling him he could do so only when "everything was over." (RT 46.)[10] Petitioner finally decided that, in order to be able to make a phone call and because he was tired and scared and wanted to leave, he would tell the detectives the story that he believed they wanted to hear and "get it straightened out" later. (RT 46-49.) Petitioner agreed to allow the detectives to record his confession because they said that he could use the telephone following the recording. (RT 48.) He testified that every one of his statements on the recording were "lies" based on what the police told him to say, and that he made these false statements in order to gain telephone access. (RT 51-57.)

Petitioner testified that he simply was given the advisement form and told to sign it, and the form was not read to him. Petitioner signed and initialed the form without reading it. He believes this occurred after his confession. (RT 36-40.) When the detectives admonished Petitioner regarding his Miranda rights, Petitioner just agreed to what they were saying because he wanted to "get out of the room and make a phone call." (RT 40.) He testified that, although he could hear the advisements given to him, he wasn't paying attention or comprehending and, therefore, "lied" when he told the police he understood his rights. (RT 50.)

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[9] Detective Remine testified that the detectives never left Petitioner during the interview and that, if one of them left the room, the other stayed with Petitioner. (RT 16.)

[10] Petitioner admitted that the police had not hit him, kicked him, put a gun to his head or otherwise threatened to hurt him in any way. (RT 56.) However, they told him he could not make a phone call to an attorney. (Id.)

Close testified that he received a five-minute telephone call from Petitioner during the early morning hours of September 2, 1993. (RT 58, 60.) Petitioner was in tears and highly agitated as he told Close that he had just confessed to a murder. Petitioner said that he had confessed because he had not been allowed to talk to his mother or an attorney, despite requests to do so, and made the confession in order to make a phone call. (RT 60-63.) Petitioner described how one of the detectives showed him a ring with the numbers "187" and drew lines on a piece of paper to illustrate "the consequences" should he confess or not. (RT 61.)

Detective Remine acknowledged that the other detective wore a ring with the numbers "187," but did not recall whether that detective ever showed Petitioner the ring. (RT 21-22.) Additionally, he did not recall that either he or his partner drew a short line and a long line on a piece of paper and showed the paper to Petitioner, and denied advising Petitioner that they represented the time he would spend in jail, depending on the "route" he took. (RT 22-24.)[11]

Defense counsel argued that the confession should be suppressed on two grounds: first, that it was involuntary and, second, that its admission violated Miranda. (RT 63-68.) The prosecution argued that Petitioner's testimony, if believed, confirmed that his statements made on tape were freely and voluntarily made. The prosecution also argued that Petitioner's contention that he asked to call his attorney before confession is inconsistent with his statements made on tape and his signature on the advisement form, i.e., that Petitioner would not have made such statements and signed that form it, in fact, his request to call counsel was being denied. (RT 68-70.)

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[11] At trial, Detective Remine denied that his partner ever showed Petitioner a gold ring with the number "187" (the California Penal Code murder statute) on it and stated, "This is what you are here for." (RT 196.)

C. The State Court Decisions.

At the conclusion of the suppression hearing, the trial court ruled that Petitioner's confession was admissible, as it was voluntary and Petitioner had waived his Miranda rights:

> Obviously, the court has to do some things regarding findings of fact in this case, because we have such very significant differences in the testimony of two witnesses in particular here.
>
> . . . .
>
> I am a fact finder first, and I have to decide and say who I believe. I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer Ramine [sic] and not the testimony of the defendant in this case. Not only because it is the defendant in this case, but for other reasons, which were the nature of the facts that were developed by both sides. Leading me, in addition, to my feelings about who I should believe and who I really do believe, but also, why I should believe as a secondary or perhaps a primary, to look at with that crediting officer Ramine's [sic] testimony. It now sheds light upon the decision.
>
> [Defense counsel] makes the best case, of course, it is made primarily by the testimony of a witness I do not credit in this case. I find there was no violation of Miranda, the Miranda rights were given ahead of time, when they have been given before incriminating statements were given. I find it is voluntary under the case law, that has developed on this whole issue, hundreds and hundreds of cases, actually, on this issue just like search and seizure, so I find it is both not a violation of Miranda, [and] voluntary, I decline to suppress the statements that were given by the defendant to the officers in this case.

(RT 70-71.)

On appeal, the California Court of Appeal rejected the present claim asserted by Ground One. After reviewing the evidence presented at the suppression hearing, the state appellate court concluded that the fact that Petitioner's testimony contradicted that of Officer Remine was not a basis for reversal, noting that "[t]he trial court explicitly found Officer Remine, and not defendant, to be the credible witness" and concluding that "[t]he evidence found credible by the trial court supports the determination that the waiver and confession were voluntary." (Return, Ex. C at 133-35.) The California Supreme Court adopted the lower court's decision through its silent denial of review.

D. Analysis

As previously mentioned, in general, this Court "must presume the correctness of the state court's factual findings." 28 U.S.C. § 2254(e)(1); Bains, 204 F.3d at 972 (ultimate issue of whether defendant was "in custody" for Miranda purposes is subject to *de novo* review, but the state court's underlying factual determinations are entitled to a presumption of correctness). See also Saelee v. Mayle, 2000 WL 288441, at *12 n.4 (N.D. Cal. March 10, 2000) (recognizing that pre-AEDPA case law -- "holding that a federal habeas court must independently consider the voluntariness of a confession rather than defer to the state court's findings" -- may no longer be good law "in light of the increased amount of deference now required under 28 U.S.C. § 2254(d), as amended by the AEDPA") (citations omitted). This presumption adhered to state court findings regarding witness credibility. Bains, 204 F.3d at 972 (with respect to Miranda-based habeas claim, "the state trial court's 'scene- and action-setting questions' (i.e., the underlying factual questions) still are entitled to a presumption of correctness," citing to Thompson v. Keohane, 516 U.S. 99, 111-12, 116 S. Ct. 457 (1995)). See generally, Anderson v. City of Bessemer, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985) ("[O]nly the trial judge can be aware of the variations in

demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); United States v. Mejia, 69 F.3d 309, 315 (9th Cir. 1995) ("There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility."); United States v. Hood, 493 F.2d 677, 680 (9th Cir. 1974) (trial judge in unique position to observe witnesses' demeanor while appellate court only has "the cold record, which is sterile in comparison").

Here, Petitioner has failed to demonstrate, by clear and convincing evidence, that the trial court's factual findings regarding credibility, and attendant factual findings regarding the voluntariness of Petitioner's confession and Miranda waivers, are not entitled to the presumption of correctness which they are afforded by 28 U.S.C. § 2254(e)(1). Therefore, crediting the state court's factual findings, this Court concludes, as it must, that Petitioner's confession was voluntary and that his waiver of his Miranda rights was a valid waiver.

The totality of circumstances here, based on the Court's independent review of the record, reveals that Petitioner voluntarily confessed. Notwithstanding Petitioner's attempt to impugn Detective Remine's testimony as a series of "I don't recall answers" (Traverse at 9), the Court's review of the record reveals that the detective's testimony established an adequate basis for the trial court to find Petitioner's confession to be voluntary and his Miranda waiver to be valid. There is no question that Petitioner repeatedly was advised of, and waived, his Miranda rights. Although Petitioner attempted, at the suppression hearing, to ameliorate the effect of his conduct by asserting that he was not paying attention and/or comprehending, there is no basis in the record for concluding that he did not both understand the advice given to him and voluntarily choose to waive those rights. The fact that Petitioner was 16 at the time does not change the Court's conclusion on the record before it. Moreover, under Petitioner's testimony, he made the choice to "lie"and confess. In short, whether or not Petitioner's confession reflected the truth, it was not involuntary.

Petitioner has not established that the decisions of the California courts rejecting Ground One were contrary to, or an unreasonable application of, clearly established Federal law as explicated by the Supreme Court. He also has not established that those state court decisions were based on an unreasonable determination of the facts in light of the evidence presented. Hence, he is not entitled to federal habeas relief under 28 U.S.C. § 2254(d)(1) or (2), and Ground One must be denied and dismissed with prejudice.

III. The Exclusion Of The Close Testimony Does Not Warrant Federal Habeas Relief.

By Ground Two, Petitioner contends that his federal constitutional rights were violated when, after admitting his confession, the trial court then precluded the admission of hearsay evidence which assertedly would establish his mental state at the time of his confession. (Amended Petition at 6.) Specifically, Petitioner alleges that the trial court should have admitted the testimony of Close regarding how Petitioner "was upset when he called him and told him that he had just falsely confessed to the charged crime due to promises and threats the police had made to him." (Id.)

A. The State Decisions.

Prior to the presentation of the defense case, defense counsel advised the trial court that he wished to present Close's testimony regarding the telephone call he received from Petitioner after he had confessed, which he proffered would be similar to the testimony given by Close at the suppression hearing, as described above. Defense counsel argued that the testimony was admissible under California Evidence Code § 1250[12] as evidence of Petitioner's pre-existing state of mind

[12] Section 1250 provides:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling,

when he made his confession. (RT 212-14.) The trial court observed:

> And that way, you are able to avoid putting your client on the stand, in so far [sic] as having him tested by cross-examination of what his intent was, and what was going through his mind when he made this claimed false confession, and you think that 1250 really allows that, for the truth of the statement to the attorney that it was a false confession.

(RT 213-14.) After hearing further argument, the trial court ruled that the proffered Close testimony was hearsay which was not admissible under Section 1250 because it was "evidence of a statement of memory or belief to prove the fact of memory or belief" and that Section 1250 was inapplicable. (RT 214-15.) The trial court further concluded that, without more, the testimony was irrelevant. (RT 215-16.) Finally, the trial court ruled that the Close testimony was excludable under California Evidence Code § 352 because, without the critical testimony from Petitioner as to his existing mental and physical state, the probative value of the Close testimony was outweighed by prejudice. (RT 216.)

The trial court noted that its ruling was without prejudice because "there certainly is a very clear way that [the evidence] would be admissible, but I haven't been proffered that." (RT 216.) In response, defense counsel did not offer any additional basis for admitting the testimony. (Id.) It appears that the court

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pain, or bodily health) is not made inadmissible by the hearsay rule when:

> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed. (Emphasis added.)

may have been alluding to the prior state of mind exception to the hearsay rule codified in California Evidence Code § 1251,[13] which the California Court of Appeal addressed, as discussed below.[14]

On appeal, Petitioner argued that: the Close testimony was relevant and was not excludable under California Evidence Code § 352; the Close testimony was not inadmissible hearsay as it was not offered for the truth of the statement but, instead, as circumstantial evidence of Petitioner's state of mind; even if the testimony was hearsay, it was admissible under California Evidence Code § 1250; and, finally, even if the testimony were inadmissible hearsay, Petitioner nonetheless had a due process right to present it as exculpatory evidence. (Return, Ex. C at 34-42.)

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[13] California Evidence Code section 1251 provides:

> Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:
>
> (a) The declarant is unavailable as a witness; and
>
> (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

[14] The Court notes that Petitioner, in his Traverse and for the first time, raises a claim that the trial court should have admitted the Close testimony under California Evidence Code § 1240. (Traverse at 12.) Section 1240 reflects the "spontaneous declaration" exception to the hearsay rule, *to wit*, for spontaneous statements made purporting to narrate, describe or explain an act, condition or event perceived by the declarant and made while the declarant is under the stress of excitement caused by such. Petitioner failed to present this claim to the California Supreme Court, whether through his petition for review or his habeas petition. (See Return, Exs. D and F, *passim*.) Petitioner did not raise this claim in his Amended Petition. The Court will not consider a claim raised for the first time in a Traverse. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994); Lewis v. Witek, 927 F. Supp. 1288, 1291 n.2 (C.D. Cal. 1996). Moreover, because this claim had not been presented to the California Supreme Court, it is unexhausted and cannot be considered. 28 U.S.C. § 2254(b)(1)(A).

The California Court of Appeal rejected each of Petitioner's arguments and concluded that the trial court properly excluded Close's testimony. With respect to Petitioner's contention that the testimony was admissible under Section 1250, the court observed that the statute applies only to a declarant's present mental state, as opposed to his mental state prior to the statement:

> By its terms, Evidence Code section 1250 is inapplicable to this case. Defendant telephoned Close after the interrogation was finished. His state of mind after the interrogation is not an issue in this case, nor does the evidence suggest there was a continuing mental state which carried over from the taped confession through the subsequent telephone call. On the contrary, we presume the taped confession was devoid of any such display of emotion, given defendant's failure to bring any such display to our attention in his appellate briefs or to the jury's attention below.

(State Decision at 136-37.) The California Court of Appeal also concluded that the Close testimony was not admissible under the prior state of mind exception embodied in California Evidence Code § 1251 because Petitioner was not unavailable as a witness. As the court noted, the fact that Petitioner had exercised his privilege against self-incrimination did not render him "unavailable," under California law, for purposes of this hearsay exception. (Return, Ex. C at 137-38.)

The California Court of Appeal also rejected Petitioner's contention that the Close testimony was relevant and should have been admitted pursuant to the Supreme Court's decision in Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142 (1986). As the court noted, in Crane, the trial court excluded the entire police officer testimony regarding the length of the defendant's interrogation and the manner in which it was conducted.

> *Crane* is distinguishable. In this case, defense counsel extensively cross-examined Remine concerning the manner in which the confession was secured. Factors including the size of the room, the length of the investigation, the lack of food and rest, the late hour, the defendant's age and smaller size, and the absence of his parents and attorney were all brought out for the jury's evaluation. The exclusion of Close's testimony regarding a post-interrogation telephone conversation is not the equivalent of the exclusion of the officers' testimony in *Crane* regarding the manner in which the confession was obtained.

(State Decision at 138.)

Finally, the California Court of Appeal addressed, and rejected, Petitioner's contention that his due process rights were violated because he was deprived of his ability to present exculpatory evidence and that the state hearsay rule must give way to his federal due process right.

> [T]his was not an instance where a state rule of evidence unfairly abridged a defendant's constitutional right to due process. Close's excluded testimony regarding the post-interrogation conversation was not the sole evidence of what went on in the interrogation room. Remine's cross-examination testimony regarding the manner in which the interrogation was conducted and the taped confession itself provided the jury with the evidence which defendant erroneously contends was missing at trial. Defendant's post-interrogation conversation with Close in which he described his prior state of mind was self-serving and "made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code § 1252.)

(State Decision at 139.)

The California Supreme Court rejected Petitioner's arguments in support of Ground Two without comment and,

therefore, did so based on the same reasons set forth in the State Decision.

B. Applicable Law.

As a threshold matter, federal habeas corpus relief generally does not lie for alleged errors of state law. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480, (1991); Engle v. Isaac, 456 U.S. 107, 121 n.21, 102 S. Ct. 1558, 1568 n.21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process . . . . If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'") (citation omitted).

In short, this Court cannot reexamine the California Court of Appeal's above-described determination (as well as the California Supreme Court's subsequent decision on the same basis) on the state law question which Petitioner presents by Ground Two, i.e., whether the Close testimony should have been admitted under California Evidence Code § 1250 and/or § 1251. As noted above, both the trial court and the California Court of Appeal found the testimony to be unreliable hearsay -- a finding confirmed by California's highest court. Under California law, the assessment of the reliability of hearsay evidence is a finding of preliminary fact (California Evidence Code § 405) which, therefore, is presumed correct under 28 U.S.C. § 2254(e)(1), absent clear and convincing evidence otherwise. Petitioner has not presented any basis for upsetting that presumption here. Hence, that determination must be presumed to be correct. For that reason, as well as the other reasons set forth in the California Court of Appeal's opinion, this Court must conclude that the trial court's exclusion of the

Close testimony fully comported with California law, including California Evidence Code §§ 1250 and 1251.

"It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." Spivey v. Rocha, 194 F.3d 971, 977 (9th Cir. 1999); see also Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) ("failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief"). Here, of course, there was no failure to comply with California's evidentiary rules. The question then is whether -- despite the state court's compliance with California law -- Petitioner nonetheless can establish any federal violation sufficient to invoke a right to federal habeas relief.

Petitioner contends here, as he did in the California courts, that the Supreme Court's Crane v. Kentucky decision mandated admission of the Close testimony. The Court concludes that the California courts' application of the Crane decision, as explained by the California Court of Appeal (State Decision at 138), was clearly reasonable. In Crane, the Supreme Court that the "wholesale exclusion" of all evidence regarding the physical circumstances of the defendant's confession, including through non-hearsay interrogating officer testimony, violated his due process right to present a defense by attacking the reliability of his confession. 476 U.S. at 690-91, 106 S. Ct. at 2147.

In marked contrast, in this case, there was no such "wholesale" denial. As the California Court of Appeal observed, defense counsel extensively cross-examined Detective Remine about the circumstances of the confession. (See RT 183-98, 202-06.) Additionally, the trial court expressly ruled, over the prosecution's objections, that the defense could present the testimony of Mills, a psychologist, regarding Petitioner's intellectual capacity for the express purpose of affording defense counsel a basis for arguing that the confession was coerced and involuntary and the jury should find that the confession lacked reliability. (RT 218-21, 223-25.)

The trial court also agreed to give, over the prosecution's objections, two special instructions proffered by defense counsel pertaining to the reliability of Petitioner's confession in light of the circumstances under which it was given. (RT 250-63; CT 54-55.) Defense counsel led his closing argument with a lengthy and vigorous attack on the circumstances of the confession, arguing that the jurors should find the confession to be coerced, involuntary, and unreliable. (RT 296-301.) The jurors thus had before them evidence of the allegedly coercive circumstances which resulted in Petitioner's confession and received instruction which directed them to consider such circumstances (e.g., Petitioner's age, education, physical and mental condition, treatment while in custody, etc.) in determining the believability of Petitioner's confession, including a direction that they were "at liberty to disregard" the confession if they found it to be "unworthy of belief." (RT 275; CT 54-55.). In short, Petitioner had the opportunity to present non-hearsay evidence regarding the physical circumstances of his confession -- the opportunity denied the defendant in Crane. Petitioner's complaint that he was not allowed to present additional, unreliable hearsay testimony regarding his own self-serving statements after the confession does not implicate the Crane decision or any good faith extension of its holding.

Finally, the Court concludes that the California courts did not err in rejecting Petitioner's argument that, even if the Close testimony was inadmissible hearsay, he nonetheless has a constitutional right to present the evidence. "The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing to Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038 (1973), and Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920 (1967)). As the Supreme Court has explained, however, the import of these holdings

> is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Montana v. Egelhoff, 518 U.S. 37, 53, 116 S. Ct. 2013, 2022 (1996) (plurality opinion). "[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." Id. at 42, 116 S. Ct. at 2017. As the Supreme Court repeatedly has made clear, state evidentiary rules which authorize the exclusion of unreliable, overly prejudicial or cumulative evidence do not violate a defendant's due process rights, including state hearsay rules which prohibit the admission of evidence found to be insufficiently reliable. Id. See also Crane, 476 U.S. at 690, 106 S. Ct. at 2146 ("[W]e have never questioned the power of the States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see the evidence admitted."); LaGrand v. Stewart, 133 F.3d 1253, 1266 (9th Cir. 1998) (concluding that, although various Supreme Court decisions "stand for the proposition that states may not impede a defendant's right to put on a defense by imposing mechanistic . . . or arbitrary . . . rules of evidence," "they do not stand for the proposition that a defendant must be allowed to put on any evidence he chooses.").

Here, the Close testimony was excluded pursuant to such a constitutionally acceptable hearsay rule, i.e., due to a failure to meet the exception embodied in California Evidence Code § 1250. Petitioner has failed to demonstrate that the exclusion of the Close testimony pursuant to this statute, or otherwise,[15] was

[15] As discussed above, Petitioner has contended that the trial court should not have found the testimony excludable under California Evidence Code § 352. Section 352 permits a trial judge to exclude relevant evidence when its probative value is outweighed by potential prejudice. Here, the California courts properly rejected Petitioner's argument that Crane v.

even erroneous, let alone a violation of due process or her right to present a defense. As the California Court of Appeal observed, Petitioner was not prevented from presenting his defense that his confession was involuntary and unreliable. Rather, the trial court merely required that he present his defense through evidentiary submissions which complied with California's evidentiary rules -- a requirement to which all litigants, whether prosecution or defendant, are subject and one which hardly can be said to be constitutionally infirm, as the Supreme Court confirmed in Egelhoff.

Petitioner has not shown that the exclusion of the Close testimony was erroneous, much less that the effect of the alleged error rendered his trial fundamentally unfair or deprived him of a defense. In sum, he has not demonstrated that the California courts erred in excluding the Close testimony. The California Court of Appeal correctly applied Supreme Court precedent when it affirmed the trial court's decision to exclude the Close testimony. Accordingly, Ground Two does not warrant federal habeas relief and should be denied. 28 U.S.C. § 2254(d)(1).

IV. Petitioner's Claim Of Instructional Errors And Conviction On An "Uncharged" Offense Does Not Warrant Federal Habeas Relief.

By Ground Three, Petitioner raises two different claims. His second claim (insufficiency of the evidence) is addressed, *infra*, in Section V. His first claim is that he was denied his federal constitutional rights when the trial court: denied his counsel's request for jury instructions on second degree murder[16]; failed

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Kentucky rendered the Close testimony relevant. Hence, there certainly was no impropriety in excluding testimony whose relevance was marginal if non-existent under Section 352 when, in the trial court's view, its prejudice outweighed its probative value.

[16] Defense counsel asserted that "a possible theory that the jury could adopt is that this murder occurred for reasons other than robbery, for any reason that came out of a brutal attack" and that a second degree murder instruction, therefore, "could be appropriate." (RT 245-47.) The trial court

to *sua sponte* instruct on premeditated murder and voluntary manslaughter; and instructed the jury on felony-murder, a purportedly "uncharged" offense, and allowed him to be convicted of felony-murder. (Amended Petition at 7 (incorporating Petitioner's arguments made in his state appeal; see Return, Ex. E at 315-331).) He argues that second degree murder and voluntary manslaughter were "lesser included offenses" of the crime with which he was actually charged, premeditated murder, and that, therefore, he was entitled to have the jury instructed as to such possible bases for conviction. (See, Return, Ex. E at 315-322.) Petitioner further argues that the jury should not have been instructed, and he could not have been convicted, based on a theory of felony-murder as the information charged him only with "malice murder," which he claims is a "separate offense." (Id. at 323-331.)

A. Petitioner's Contention That He Was Convicted Of An Uncharged Offense, Felony-Murder, And That The Jury Should Not Have Been Instructed As To Felony-Murder, Is Meritless.

On appeal to the state courts and in his habeas petition to the California Supreme Court, Petitioner argued that he had been charged only with first degree "malice murder," that malice murder is a "separate crime" from first-degree felony murder, and that, by providing the jury with only felony-murder instructions and no instructions on malice murder, the trial court instructed the jury on an uncharged crime and allowed the jury to convict him of an uncharged crime. He raises that same claim here as a subclaim of Ground Three.

The California Court of Appeal flatly rejected Petitioner's arguments, including his contention that he had not been charged with felony-murder:

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disagreed, concluding that a reasonable jury, if it found Petitioner guilty at all, could only find that this was a murder committed in the course of a robbery and was of the first degree. He therefore declined to give a second degree murder instruction and defense counsel raised no further argument. (RT 247.)

> The information . . . alleged both the premeditated malice murder of William Shadden on May 31, 1992, and the second degree robbery of the same victim on the same date, both with the personal use of a firearm. In addition, the murder count expressly alleged that the murder was committed while the defendant was 'engaged in the commission of the crime of Robbery, within the meaning of . . . section 190.2[subd.](a)(17)." Although the information did not mention [California Penal Code] section 189, the allegations were nevertheless sufficient to put defendant on notice that he was being charged with a murder that occurred during the commission of a robbery, or felony murder. Moreover, a defendant charged with malice murder may be convicted upon a theory of felony murder. It is not necessary that an information charging murder with malice must also expressly charge a felony murder under section 189. (*People v. Scott* (1991) 229 Cal. App. 3d 707, 712-718.) There was no due process violation.

(State Decision at 141-42.) The state court specifically rejected Petitioner's contention that, because the information explicitly referenced California Penal Code § 187(a) (premeditated murder with malice aforethought) but did not explicitly cite to California Penal Code § 189 (felony-murder), he was charged only with malice murder and had been convicted of an uncharged offense. Noting that the California statutes specifying the matters which must be contained within an information do not require "that the statute which the accused is charged with violating be designated by number," the state court concluded that "it would have been sufficient to allege that defendant had murdered Shadden, without specifying the degree." (State Decision at 142-43 (citations omitted).)

In short, the state courts found that Petitioner's argument rests on a fatally flawed assumption, i.e., that there had been an actual failure to adequately charge him with felony-murder. Having reviewed the record and applicable California law, and

for the reasons stated by the California Court of Appeal, the Court agrees.

The information alleged that Petitioner murdered Shadden while he was "engaged in the commission of the crime of Robbery." The information also charged that Petitioner committed the crime of second degree robbery, along with first degree murder. (CT 24.) It is long established under California law that a defendant charged with premeditated murder may be convicted based upon a theory of felony-murder. See People v. Wilkins, 26 Cal. App. 4th 1089, 1096, 31 Cal. Rptr. 2d 764, 769 (1994) (rejecting claim that, because information charged defendant with malice aforethought murder consistent with Penal Code § 187, defendant was improperly convicted of "an uncharged and separate offense, felony murder"); People v. Scott, 229 Cal. App. 3d 707, 712-18, 280 Cal. Rptr. 274, 277-81 (1991) (rejecting the same argument made by Petitioner here and noting that the proposition that a defendant can be convicted of felony-murder even though the information charged murder with malice has been the law in California since at least 1915). See also Stephens v. Borg, 59 F.3d 832, 935 (9th Cir. 1995) (citing People v. Gallego, 52 Cal. 3d 115, 276 Cal. Rptr. 679 (1990), for the "well established rule that 'a pleading charging murder adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory'"). The information at issue here adequately charged Petitioner with felony-murder under well-established California law. Petitioner has not shown otherwise, and the very argument he presently makes was soundly and specifically rejected in Scott, *supra*.[17]

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[17] In particular, the court explicitly addressed at length and rejected the argument, made by Petitioner, that the California Supreme Court's decision in People v. Dillon, 34 Cal. 3d 441, 194 Cal. Rptr. 390 (1983), somehow changed the longstanding California law in this respect. Scott, 229 Cal. App. 3d at 713-18, 290 Cal. Rptr. at 277-81. That *premeditated murder and felony-murder may be "separate" crimes does not* vitiate the adequacy of the information here, under California law and as acknowledged by the Ninth Circuit.

Moreover, Petitioner received adequate notice, consistent with the Sixth Amendment and due process, that he was being tried for felony-murder. The prosecutor's brief opening statement argued only a felony-murder theory, not a malice murder theory. (RT 74-75.) Evidence was presented at trial to support the robbery charge. (RT 97-103, 119-20, 123-24.) The prosecution requested only that felony-murder and robbery instructions be given. (CT 62-64, 69-72.) As the prosecution was proceeding only on a theory of felony-murder -- a theory which was adequately charged by the information and which did not reflect an "uncharged offense," Petitioner's assertions notwithstanding -- and as defense counsel did not request that the jury be instructed with "malice murder" instructions,"[18] there was no error of any kind on the trial court's part in instructing the jury based on a felony-murder theory and not on a malice murder theory. See Stephens, 59 F.3d at 935 ("under clear California law, the jury may be instructed on felony murder even though the indictment does not expressly set out such a theory"). There simply was not a failure to instruct on any element of a charged offense, as the case was one pursued solely as a felony-murder offense. For the same reasons, Petitioner was not deprived of any constitutional rights when he was convicted under the felony-murder theory rather than under a "malice murder" theory. Id., at 935-36 (when defense counsel received notice that prosecution would request felony-murder instructions while defense case was proceeding, five days before closing arguments, defendant received constitutionally adequate notice and was not to entitled to habeas relief); Morrison v. Estelle, 981 F.2d 425, 428 (9th Cir. 1992) (petitioner received constitutionally adequate notice of felony-murder theory when the prosecution presented evidence of robbery and requested felony-murder instructions at the initial instructions conference two days before closing arguments).

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[18] As noted above, defense counsel only requested second degree murder instructions. (See CT 88-90.) For the reasons set forth below, Petitioner may not obtain habeas relief based on the trial court's failure to grant his counsel's request.

This subclaim of Ground Three -- i.e., Petitioner's contention that he was convicted of an uncharged offense in violation of the Constitution, following improper felony-murder instructions rather than "malice murder" instructions -- is factually and legally devoid of merit. The California courts did not err in rejecting, and Petitioner is not entitled to habeas relief based on, this subclaim. 28 U.S.C. § 2254(d)(1) and (2).

B. Petitioner's Claim That He Was Entitled To Lesser Included Offense Jury Instructions Is Not Cognizable.

By his second instructional error subclaim, Petitioner argues that second degree murder and voluntary manslaughter are lesser included offenses of felony-murder and that, as a result, he was entitled to have the jury instructed on these theories.

Last year, the Ninth Circuit reaffirmed its adherence to its holding in Bashor v. Risley, 730 F.2d 1228 (9th Cir. 1984), that "the failure of a state court to instruct on a lesser offense [in a non-capital case] fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) (citations and internal quotations omitted); see also Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 685 (9th Cir. 1999); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988); James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976).

In Solis, the Ninth circuit summarized the United States Supreme Court precedent on the present issue as follows:

> In 1980, the [United States] Supreme Court held that a defendant in a capital murder case has a constitutional right to have the jury instructed on a lesser included offense in certain instances. *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Supreme Court explained that when a jury is given only two options, "not guilty" and "guilty of capital murder,"

> even though the evidence would support an instruction on a lesser included offense, the risk that the jury will convict although it has reasonable doubt is too great and a third option, namely a lesser included, non-capital offense instruction, is required. *Id.* In a footnote, the Court expressly reserved judgment on "whether the Due Process Clause would require the giving of such instructions in a non-capital case." *Id.* at 638 n.7.

Solis, 219 F.3d at 928.

Continuing on, the Ninth Circuit noted that the high court's silence on the question of whether Beck applied to non-capital cases has resulted in a split among the circuits on the issue. Solis, 219 F.3d at 928-29; see Turner, 63 F.3d at 819 (acknowledging an "intercircuit split" regarding whether a claim of failure to instruct on a lesser included offense raises a question of constitutional dimension). The Ninth Circuit concluded that the rule of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 10160 (1989), "barred [the federal courts] from changing the law regarding failure to instruct errors in the context of a habeas petition" and that Bashor and its predecessors remain controlling on this issue with respect to cases arising in this Circuit. Solis, 219 F.3d at 929.[19]

Petitioner argues that, nonetheless, he is entitled to habeas relief because the lesser included offense instructions were needed "to present his theory of the case." (Traverse at 14.) In Solis, as in Bashor, the Ninth Circuit recognized that a cognizable claim might be stated when a trial court has refused to instruct on lesser included offenses and those offenses are consistent with a defendant's theory of the case. 219 F.3d at 922. However, the court found that no such claim has been stated on the facts before it, as the evidence presented at trial

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[19] The Ninth Circuit, in Turner, determined that a finding of constitutional error in a non-capital case due to the failure to instruct on a lesser included offense would constitute a new rule of law, in violation of the Teague doctrine. 63 F.3d at 819. See generally Bell v. Hill, 190 F.3d 1089, 1090-91 (9th Cir. 1999) (noting that a habeas petitioner cannot benefit from a "new" rule and discussing application of Teague).

did not support the requested lesser included offense charges.

Petitioner has not articulated any basis for finding that his "theory of the case" encompassed second degree murder and voluntary manslaughter, and the Court's review of the record reveals none. Defense counsel did not make an opening statement at the start of trial and declined to do so at the start of the defense case. (RT 75, 227; CT 40-41.) Petitioner did not testify. The only defense witness presented was Mills, the psychologist, whose testimony was presented for the sole purpose of affording defense counsel a basis for arguing to the jury that Petitioner's confession was unreliable. (See RT 218-25.) In his closing argument, defense counsel argued only two matters: first, and principally, he endeavored to attack the reliability of Petitioner's confession in light of the circumstances under which it was given; and second, and to a lesser extent, he asserted that there was no physical evidence linking Petitioner to the crime and attacked the reliability of the Ofhgang and Bonilla testimony. (RT 295-305.) Defense counsel did not argue to the jury any facts or theory which might encompass second degree murder or voluntary manslaughter. Rather, in essence, he simply endeavored to convince the jury that Petitioner was not the perpetrator and confessed due to coercion. (Id.)

Petitioner has not established, and cannot establish on this record, that his "theory of the case" was second degree murder and/or voluntary manslaughter and that he was deprived of presenting his theory through the trial court's failure to instruct on these asserted lesser included offenses. His counsel did not urge that voluntary manslaughter instructions be given during the instructions conference, and his sole stated justification for a second degree murder instruction was that the jury possibly could find that the murder occurred "for reasons other than robbery, for any reason that came out of a brutal attack." (RT 247.) However, as the trial court concluded, "the clear state of the evidence in this case" established a murder during the commission of a robbery, and there was no conclusion which the jury could draw other than that this was a murder which

occurred during the commission of a robbery. (Id.) Based on the entirety of the record, the Court agrees and finds that defense counsel's proffered justification for a second degree murder instruction was unsupported and contrary to the evidence. Accordingly, the trial court's failure to instruct on such lesser included offenses does not state a cognizable claim based on the "theory of the case" exception to the Bashor rule. See Solis, 219 F.3d at 929 (agreeing with state appellate court's conclusion that there was "no error in the trial court's refusal to instruct on voluntary and involuntary manslaughter because there was not substantial evidence to support either charge").

In light of Ninth Circuit precedent and the absence of clearly established United States Supreme Court precedent on the present issue, this Court concludes that Petitioner has failed to raise a cognizable claim based on the trial court's failure to instruct on lesser included offenses. Accordingly, he is not entitled to federal habeas relief on this subclaim of Ground Three. 28 U.S.C. § 2254(d)(1).

V. Petitioner's Conviction Was Supported By Sufficient Evidence.

As the second subclaim of Ground Three, Petitioner asserts that he was convicted based upon insufficient evidence.[20] (Amended Petition at 7.) His theory is as follows:

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[20] In the Return to the First Amended Petition (at 22-25), Respondent argues that Petitioner's claim of insufficient evidence is procedurally defaulted. Where, as here, it is easier to resolve Petitioner's claim on the merits, the interests of judicial economy counsel against deciding more complicated or uncertain procedural issues. See Lambrix v. Singletary, 520 U.S. 518, 524-525, 117 S. Ct. 1517, 1523-24 (1997) (explaining that the interests of judicial economy might counsel denying claim on merits rather than on procedural basis where it was "easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."); Walters v. Maass, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995) (noting that, because the petitioner's claim "fails on the merits, the interests of comity and judicial efficiency are better served by addressing the claim on the merits"). Accordingly, the Court has considered Petitioner's insufficiency of the evidence claim on the merits.

In his habeas petition to the California Supreme Court, Petitioner argued that Ofhgang did not see Petitioner return to pick up Shadden's bicycle that Gray saw Rodriguez, not Petitioner, return and attempt to take the bicycle. Petitioner asserted that he never obtained possession of Shadden's bicycle and that, as a result, at the time when Shadden chased him and Petitioner shot him, Shadden retained possession of his bicycle. He contented that, as he never had possession of the bicycle, he should not have been found guilty of robbery. Petitioner argued that a habeas court, reviewing the evidence, must find that Petitioner's conduct in leaving the bicycle and running away constituted an abandonment of his specific intent to steal the bicycle. (Return, Ex. F at 239-42.) Petitioner further argued that the prosecution failed to establish his "specific intent" to commit first degree murder and failed to acknowledge that he was acting in self-defense when he shot Shadden, as a result of Shadden's pursuit. Petitioner asserted: "It is clear that but for the pursuit of the petitioner by the victim, the victim would TODAY BE ALIVE." (Id. at 243-46; emphasis in original.)

In this action, Petitioner again asserts that his conduct evidenced an abandonment of his specific intent to commit robbery which occurred before he shot Shadden. (Traverse at 17.) He apparently reasons that, as he purportedly was not properly convicted of robbery, he therefore cannot properly have been convicted of felony-murder.

Under the Due Process Clause of the Fourteenth Amendment, a defendant cannot be convicted of a crime unless he has been found guilty of every fact necessary to establish the crime beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). Therefore, a state prisoner who is convicted of a crime and alleges that the evidence was insufficient to find guilt beyond a reasonable doubt states a constitutional claim for habeas relief. See Jackson v. Virginia, 443 U.S. 307, 321, 99 S. Ct. 2781, 2790 (1979).

When a federal court reviews a sufficiency of the evidence claim in a habeas corpus petition, its job is not to determine

whether it is satisfied that the evidence established guilt beyond a reasonable doubt, however. See Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). Rather, under the standard enunciated in Jackson, it must determine only whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original). When faced with a record of historical facts that supports conflicting inferences, the federal court must presume -- even if it does not affirmatively appear on the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. See id.

The reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters, 45 F.3d at 1358; see also Jackson, 443 U.S. at 319, 324-26, 99 S. Ct. at 2789, 2792-93. "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." Walters, 45 F.3d at 1358 (citation and internal quotation marks omitted).

This Court must look to state law to determine what evidence is necessary to convict on the crime charged. See Jackson, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16. Additionally, the Court defers to the state court's interpretation of state law. See Wainwright v. Goode, 464 U.S. 78, 84, 104 S. Ct. 378, 382 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"); see also Missouri v. Hunter, 459 U.S. 359, 368, 103 S. Ct. 673, 679 (1983) (federal courts are bound to accept the state court's construction of that state's statutes).

Under California law, a first-degree felony-murder charge, premised on a killing which occurs substantially contemporaneously with a robbery, is defined as: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted

commission of [robbery] is murder of the first degree when the perpetrator had the specific intent to commit that crime." CALJIC No. 8.21 (6th ed. 1996). (See CT 63.) "The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." Id.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." California Penal Code § 211; see People v. Waidla, 22 Cal. 4th 690, 737, 94 Cal. Rptr. 2d 396, 428 (2000). The property must be taken with the specific intent to permanently deprive the person of the property. People v. Thompson, 27 Cal. 3d 303, 313 n.4, 165 Cal. Rptr. 289, 293 n.4 (1980); In re Albert A., 47 Cal. App. 4th 1004, 1007, 55 Cal. Rptr. 2d 217, 219 (1996). "The robber's escape with the loot is not necessary to commit the crime." People v. Pham, 15 Cal. App. 4th 61, 65, 18 Cal. Rptr. 2d 636, 638 (1993). "There is no requirement that the robber have manual possession of the property." Id.; see also people v. Quinn, 77 Cal. App. 2d 734, 176 P. 2d 404, ___ (1947) (robbery committed when defendant ordered victim, at gunpoint, to throw wallet to ground but then let victim leave with wallet after victim established it did not contain money).

Here, the evidence amply supports Petitioner's conviction. In his confession, heard by the jury, Petitioner admitted that: he went to Belmont Shores to steal bicycles; he and Rodriguez targeted Shadden when they saw him riding by; the van turned around to pursue Shadden; Petitioner and Rodriguez grabbed Shadden's bicycle in order to stop him and steal the bicycle; Shadden was forced off the bike and Rodriguez said "get the bike" and moved forward to take it; Shadden sprayed him with Mace; Shadden chased Rodriguez; Petitioner stayed and Shadden returned because Petitioner was trying to take his bicycle; and, when Shadden ran after Petitioner, he shot him twice. (Confession Transcript at 370-72, 376-79.) Rodriguez returned to take the bicycle but dropped it once he realized he was being observed. (RT 80-81, 103, 126-27.)

In short, Petitioner confessed to shooting Shadden in the course of an aborted attempt to steal his bicycle. "It is established in [California] that after proof of the corpus delicti the confession of a defendant is sufficient to warrant a conviction." People v. Vuyacich, 57 Cal. App. 233, 236, 206 P. 1031, 1032 (1992); People v. Meyers, 7 Cal. App. 2d 351, 354-55, 46 P. 2d 282, 283-84 (1935) ("It is well settled that the identity of the perpetrator of a crime is no part of the corpus delicti . . . and that proof of the corpus delicti plus proof of the confession of the defendant is sufficient to sustain a conviction.") (citations omitted).[21] "When the corpus delecti has been established a defendant may be convicted on the strength of his own confession." People v. Childers, 154 Cal. App. 2d at 22-23, 315 P.2d at 483-84 (finding evidence was sufficient to support robbery conviction based upon the strength of the defendant's confession, although none of the victims positively identified appellant as being the robber).

However,

> A confession is not conclusive against an accused. Its weight and credibility as evidence are to be determined by a jury upon the same principles that they determine the weight and credibility of any evidence; that is, upon the consideration of all the circumstances connected therewith.

Vuyacich, 57 Cal. App. at 236, 206 P. at 1032.

Here, it is apparent that Petitioner's confession was found to be credible by the jury.[22] That confession was sufficient evidence supporting the jury's finding that the murder of Shadden occurred during the commission of a robbery.

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[21] "All that is required to be shown by the prosecution to establish the corpus delicti is that a crime has been committed by someone." People v. Childers, 154 Cal. App. 2d 17, 22, 315 P.2d 480, 483 (1957).

[22] The jury deliberated for less than four hours before rendering its verdict. (CT 41 and 101.) The duration of the deliberations strongly suggest that the jury found Petitioner's confession to be credible and relied heavily upon it in rendering its verdict.

Moreover, Petitioner's confession to the crime was corroborated by Ofhgang's testimony regarding the circumstances surrounding the robbery and Bonilla's recollection of Petitioner's incriminating conversations and conduct immediately following the crime.

Petitioner argues that he "never had possession" of the bicycle and that, therefore, he cannot have been found to have committed robbery. Petitioner's argument overlooks, and is wholly negated by, a wealth of California law regarding what conduct is sufficient to constitute a taking for purposes of robbery. See, e.g., People v. Alvarado, 76 Cal. App. 4th 156, 90 Cal. Rptr. 2d 129 (1999) (sufficient evidence found where defendant, a passenger, ordered victim to stop car while making movements implying he had a gun in his waistband and victim then stopped car and ran away while retaining possession of car keys); People v. Torres, 43 Cal. App. 4th 1073, 1078-79, 51 Cal. Rptr. 2d 77, 79-80 (1996) (there was sufficient evidence to sustain a robbery conviction on following facts: victim discovered defendant in her car, attempting to take her stereo; when victim's friend approached, defendant swung a screwdriver at him; defendant got out of the car, holding the stereo and screwdriver, victim's friend told defendant to leave and victim told him to put the stereo back; defendant left the stereo in victim's car and departed); Pham, 15 Cal. App. 4th 64-67, 18 Cal. Rptr. 2d at 638-39 (robbery found where defendant exited victim's car with bag, victim gave chase and grabbed defendant's shirt, defendant dropped bag and slugged victim: possession and asportation found to have commenced when defendant exited car and to have continued throughout time defendant struggled with victim, even though he had dropped the bag); Quinn, *supra* (victim complied with robber's demand to throw down his wallet). Here, Petitioner, with Rodriguez, admittedly grabbed Shadden's bike, and Shadden was forced off. Shadden chased Rodriguez and then turned around and chased Petitioner who remained near the bicycle. Petitioner's contention that he never had possession of the bicycle is factually erroneous and legally ineffective under California law.

Petitioner's argument that the Court should find that he "abandoned" his intent to steal the bicycle once he ran away from Shadden asks this Court to step into the place of the jury and ignore both his confession and prevailing California law. This Court, of course, cannot usurp the province of the jury. Even if the Court could do so, there is no evidence which supports Petitioner's after-the-fact , self-selving and unsworn assertion that he "abandoned" his intent to steal just before he shot Shadden. His confession supports the opposite conclusion, and Petitioner did not testify at trial. In any event, his contention, even if it were to be believed, is of no legal moment for, as noted above, a criminal need to "escape with the loot" in order to commit the crime of robbery in California: the robbery remained in progress during his struggle with Shadden even though Petitioner was not holding the bicycle in his hands. See Pham, *supra*. See also CALJIC 8.21.1.

The jury had before it sufficient evidence on which to convict Petitioner of robbery. The jury also had sufficient evidence on which it could conclude that Shadden's murder was committed during the course of a robbery or attempted robbery. Hence, the jury properly convicted Petitioner of first degree felony-murder.

Petitioner's secondary argument -- *to wit*, that there was insufficient evidence for the jury to find that he had the specific intent to commit first degree murder because he was acting in self-defense -- is meritless. The jury did not need to find any such "specific intent" in order to convict Petitioner of felony-murder and his purported self-defense is irrelevant. See People v. Tabios, 67 Cal. App.4th 1, 7-8, 78 Cal. Rptr. 2d 753, 756-57 (1998); see also People v. Smithson, 79 Cal. App. 4th 480, 501, 94 Cal. Rptr. 2d 170, 184 (2000) (rejecting a claim that, because a killing during a robbery was "accidental," the felony-murder rule was inapplicable: "How the killing occurred and whether it was intentional are irrelevant"). The jury only need to find that Petitioner had the specific intent to commit robbery, of which Petitioner's confession provided ample evidence.

Petitioner has not established that the evidence was insufficient to support his conviction. A rational jury, on this record, could have found Petitioner guilty of robbery and felony-murder. Accordingly, he is not entitled to federal habeas relief on this subclaim of Ground Three.

VI. Petitioner's Sentence Does Not Violate The Prohibition Against Cruel And Unusual Punishment.

By Ground Four, Petitioner contends that, in light of his youth and lack of prior convictions, his "limited intellectual capacity," and the circumstances of his crime (which he characterizes as an "amateurish and ineffectual attempt to steal a $20 bicycle), his sentence of life without the possibility of parole is cruel and unusual punishment in violation of the Eighth Amendment. (Amended Petition at 7.)

The Eighth Amendment's prohibition against cruel and unusual punishment does not require strict proportionality between a sentence and the crime on which it is based. See Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring) (upholding life sentence without possibility of parole for simple possession of 672 grams of cocaine by defendant with no prior felony convictions); Rummel v. Estelle, 445 U.S. 263, 271, 100 S. Ct. 1133, 1138 (1980) (upholding life sentence on third felony conviction for obtaining $120 under false pretenses). Rather, in non-capital cases, "[t]he Eighth Amendment 'forbids only extreme sentences that are grossly disproportionate to the crime' . . . ." United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992) (quoting Harmelin, 501 U.S. at1001, 111 S. Ct. at 2705); see also United States v. Harris, 154 F.3d 1082, 1084 (9th Cir. 1998) (recognizing that Justice Kennedy's view that the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime is the rule of Harmelin). Thus, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare." Rummel, 445 U.S. at 272, 100 S. Ct. at

1138; see also Harmelin, 501 U.S. at 994-95, 111 S. Ct. at 2701-02.

In reviewing the appropriateness of a particular sentence, courts must "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments." Solem v. Helm, 463 U.S. 277, 289, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983). A punishment within the legislatively mandated guidelines is presumptively valid. United States v. Mejia-Mesa, 153 F.3d 925, 930 (9th Cir. 1998). "Generally, so long as the sentence imposed does not exceed the statutory maximum, it will not be overturned on Eighth Amendment grounds." United States v. McDougherty, 920 F.2d 569, 576 (9th Cir. 1990). See also Belgarde v. Montana, 123 F.3d 1210, 1214 (9th Cir. 1997) (same).

As a threshold matter, Petitioner does not argue that his sentence is at variance with California sentencing guidelines. Indeed, he specifically acknowledged in his sentencing memorandum to the trial judge that the maximum sentence under state law was correctly calculated as 25 years to life with or without the possibility of parole. (See CT at 106-07.) His sentence, therefore, presumptively constitutional.

Petitioner's appeal to his youth is unavailing. While the United States Supreme Court has held that "a sentencer in a capital case must be allowed to consider the mitigating qualities of youth," Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 2668-69 (1993), the Supreme Court has not held such to be the case outside the capital context. The Ninth Circuit has held that, in the non-capital context, a defendant's age has no bearing in assessing the constitutionality of the sentence imposed under a disproportionality analysis. In Harris v. Wright, 93 F.3d 581 (9th Cir. 1996), a fifteen-year-old defendant was sentenced by a Washington state court to life in prison without the possibility of parole, after having aided and abetted a robbery in which his accomplice shot and stabbed the store owner to death. Id. at 582. The Ninth Circuit court rejected the defendant's suggestion that his sentence was disproportionate in light of his youth, declining to "substitute

[the court's own] inevitably subjective judgment about the best age at which to draw a line . . . for the judgments of the Nation's legislatures." Id. at 584 (quoting Thompson v. Oklahoma, 487 U.S. 815, 853-54, 108 S. Ct. 2687, 2708-09 (1988) (O'Connor, J., concurring)).[23]

The Ninth Circuit, in Harris, rejected the habeas petitioner's contention that an inference of gross disproportionality must be drawn when the "'penultimate' punishment" of life imprisonment without parole is imposed on one who committed his crime at 15. Outside of the capital punishment context, "there's no constitutional (or rational) basis for classifying punishment in distinct, ordinal categories." 93 F.3d at 584.

> As the Supreme Court noted in *Harmelin*, 501 U.S. at 996, 111 S. Ct. at 2702, if we put mandatory life imprisonment without parole into a unique constitutional category, we'll be hard pressed to distinguish mandatory life with parole; the latter is nearly indistinguishable from a very long, mandatory term of years, and that, in turn, is hard to distinguish from shorter terms. Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. *See id.* at 995-96, 111 S. Ct. at 2701-02. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.

93 F.3d at 584-85.

For the same reasons here, Petitioner's sentence cannot be found to be disproportionate in light of his crime -- murder. Petitioner's assertion that his sentence is disproportionate because of "the circumstances of the instant case (amateurish

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[23] The Ninth Circuit, in Harris, held that Justice O'Connor's concurrence in Thompson v. Oklahoma represents the Supreme Court's holding in that plurality opinion. 93 F.3d at 584.

and ineffectual attempt to steal a $20 bicycle)" (Amended Petition at 7) is unavailing. Petitioner murdered Shadden in the course of an attempt to steal a bicycle, a crime to which he has admitted. The fact that the attempt was "amateurish" and unsuccessful, and that the bicycle did not have a high monetary value, does not change the fact that Petitioner killed another human being as a result. Any notion that the proportionality analysis should turn on the professionalism or degree of success of the underlying crime, or the value of the property involved, not only is repugnant when a senseless murder is involved but also is wholly contrary to existing Supreme Court precedent, as discussed above.

Finally, Petitioner's contention that his punishment is disproportionate in light of his "limited intellectual capacity" also must be flatly rejected. Petitioner's contention misstates the record. The only evidence of Petitioner's intellectual capacity was the testimony of Mills, presented as a part of the defense case. The psychologist testified that Petitioner's intellectual capacity is at the low end of average. (RT 230-31.) There is no evidence in the record that Petitioner possesses a limited or impaired intellectual functioning and, hence, there is no basis for his present argument.

The United States Supreme Court and the Ninth Circuit have upheld both capital sentences and sentences of life imprisonment without the possibility of release for those under 18 years of age. See Stanford v. Kentucky, 492 U.S. 361, 377-80, 109 S. Ct. 2969, 2979-80 (1989) (upholding sentence of capital punishment as applied to 16 or 17 year-olds convicted of murder); Harris, 93 F.3d at 583-84 (mandatory life imprisonment without possibility of parole for a 15 year-old defendant convicted of murder). Petitioner's sentence comported with that designated by the California Legislature as befitting his crime. California Penal Code § 190.5(b) (sentence of life imprisonment without parole for first degree murder committed with special circumstances for those 16-17 years old at time of crime). Had Petitioner been 18 or older when he murdered Shadden, he could have received the death penalty.

California Penal Code § 190.2. Petitioner's sentence unquestionably is a harsh one. However, it is not for this Court to substitute its subjective judgment regarding Petitioner's appropriate punishment for the determination made by the State of California.

Existing United States Supreme Court precedent does not support any finding that Petitioner's sentence is so disproportionate as to constitute a violation of the Eighth Amendment. The California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Federal law. Accordingly, Petitioner is not entitled to federal habeas relief under Ground Four. 28 U.S.C. § 2254(d)(1).

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing this action with prejudice.

Dated: June 4, 2001.

/s/
MARGARET A. NAGLE
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX C

FILED
NOV 1 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEIF TAYLOR,	)	No. CV 97-7033-RJK (MAN)
	)	
Petitioner,	)	**ORDER ADOPTING**
	)	**FINDINGS,**
v.	)	**CONCLUSIONS AND**
	)	**RECOMMENDATIONS OF**
THOMAS MADDOX,	)	**UNITED STATES**
Interim Director,	)	**MAGISTRATE JUDGE**
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, all of the records herein, the Report and Recommendation of United States Magistrate Judge, and Petitioner's Objections. The Court accepts and adopts the Magistrate Judge's Report and Recommendation and the findings of fact, conclusions of law, and recommendations therein.

IT IS ORDERED that the First Amended Petition is denied and Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: NOV 1, 2001.

/s/
ROBERT J. KELLEHER
United States District Judge

APPENDIX D

FILED
NOV 1 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEIF TAYLOR, Petitioner, v. THOMAS MADDOX, Interim Director, Respondent.	No. CV 97-7033-RJK (MAN) **JUDGMENT**

IT IS ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: OCT 31, 2001.

/s/
ROBERT J. KELLEHER
United States District Judge

APPENDIX E

FILED
JUN 16 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEIF TAYLOR, Petitioner-Appellant, v. **THOMAS M. MADDOX, Interim Director; GEORGE GALAZA; CAL TERHUNE,** Respondents-Appellees.	No. 02-55560 D.C. No. CV-97-07033-RJK **ORDER**

Before: **KOZINSKI** and **T.G. NELSON**, Circuit Judges, and **RESTANI**, Judge.*

The petition for rehearing and rehearing en banc is DENIED. See Fed. R. App. P. 35; Fed. R. App. P. 40. The mandate shall issue forthwith. Fed. R. App. P. 2. The state should get on with its retrial, if it's going to have one.

*The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

APPENDIX F

FILED
DEC 6 1996

NOT TO BE PUBLISHED

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

THE PEOPLE, Plaintiff and Respondent, v. LEIF EUGENE TAYLOR, Defendant and Appellant.	B091340 (Super. Ct. No. NA 018040)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Sheldon, Judge. Affirmed.

Robert Franklin Howell, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Robert Carl Schneider and Frederick Grab, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Leif Taylor[1] guilty of first degree felony murder and second degree robbery, both with personal use of a firearm. (Pen. Code, §§ 187, subd. (a), 189, 211, 212.5, 12022.5, subd. (a).)[2] The jury having found the robbery special circumstance allegation to be true (§ 190.2, subd. (a)(17)), defendant received a sentence of life without the possibility of parole (§ 190.5, subd. (b)). We affirm the judgment.

BACKGROUND

On the night of May 31, 1993, William Shadden was riding his bicycle home from his job as a gondola rower in Belmont Shore in Long Beach. Shadden was ambushed near the corner of Ocean and La Verne by defendant, then 16, and another youth who forced him off his bicycle in a strong-arm robbery.[3] Shadden, who did not know defendant was carrying a concealed handgun, gave chase. Defendant ran off, with Shadden in pursuit. While running, defendant pulled the gun out with his right hand and aimed it under his left arm, firing twice. Shadden died as a result of his injuries.

Identity was the main issue at trial. Two eyewitnesses testified, but neither could positively identify defendant. The prosecution, however, played defendant's taped confession for the jury after the court denied defendant's exclusionary motion. (Evid. Code, § 402.) In addition, the prosecution introduced defendant's oral admission ("'I think I killed the fool'") through a pretrial statement made to police by a female companion, Ana Bonilla, who was with defendant shortly after the shooting.

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[1] Defendant's first name is spelled both Lief and Leif in the record. The transcript of defendant's testimony at the Evidence Code section 402 hearing shows, however, that defendant goes by Leif, which is the version adopted in this opinion.

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

[3] The record does not indicate whether the other youth, identified as Victor Rodriguez, was caught or tried.

FACTS

According to eyewitness Debra Gray, who lived in a second story apartment at the location, two gunshots were fired around 11:20 p.m. Gray looked out her front door in time to see "a young male Hispanic, attempting to pick up a bike." She heard him say either, "we . . . shot or got the fucker." She also saw the other eyewitness, Gerald Ofhgang, emerge from his pickup truck and head toward the bicycle as the two assailants ran off. Ofhgang found Shadden lying in a bed of iceplant and yelled to Gray. Gray called 911 and ran down to help.

According to Ofhgang, he saw "two men, each with their hands on opposite handlebars of the bicycle, attempting . . . to shake [Shadden] off the bicycle." Ofhgang described the assailants as "[b]oth [having a] slim build, one approximately five five, five six, the other closer to about five eight, five nine, short-cropped hair, white bagg[y] t-shirts, dark, possibly black bagg[y] pants, and I believe both wearing sneakers or tennis shoes." He thought "they both appeared to be light-skinned Hispanics [with] the shorter man being 14 to 15, the taller being 16 to 17." Ofhgang was certain the shorter man was not defendant, but was unable to identify defendant as the taller man.

Ohfgang testified he had seen Shadden chasing the taller man down a sidewalk as the shorter man ran down the middle of the street. Ofhgang lost sight of Shadden and the taller assailant, but saw the shorter man come back for the bicycle. Ofhgang moved his truck closer to the bicycle to scare the shorter man away. When the shorter man noticed Ofhgang's approaching truck, he dropped the bicycle and ran away. Ofhgang got out of the truck and put the bicycle on the sidewalk. He also picked up Shadden's backpack before discovering Shadden lying in the iceplant.

The coroner testified Shadden died of two gunshot wounds, one to the chest and the other to the left shoulder. From the absence of sooting or tattooing around the wounds, the coroner concluded the gun had been fired from more than two feet

away.

Ana Bonilla, age 17, had heard about a reward for information concerning the crime and was interviewed by Long Beach Police Department homicide detective Craig Remine. She knew both defendant and Victor Rodriguez (also known as Chris or Cress). She testified to being in a van with six or more people on the night of and in the vicinity of the shooting. She testified she had seen defendant and Rodriguez enter the van near the intersection of La Verne and Ocean and heard someone say something about someone having been killed, but was unsure who said it. She testified she also heard someone say, "'pee on my hand[,]'" but did not see anyone do so.

Remine testified, however, to two significant discrepancies between Bonilla's testimony and her pretrial statement. According to Remine, Bonilla had said she heard defendant say, "'I think I killed the fool[.]'" In addition, Bonilla had said "[t]hat, after the defendant and Victor Rodriguez entered the van, north of the crime scene, that she turned around in the van, to face the rear of the van, and she observed, I forgot which one of the individuals in the van, but one of them was urinating on the defendants hands." Remine explained the urine would have made a gunshot residue test worthless had the van been stopped by the police that night.

Remine also gave the following account at trial of defendant's arrest and interrogation. Remine went to defendant's home at 11:30 p.m. on September 1, 1993, to serve arrest and search warrants. Defendant was asleep on the couch when the officers entered. After defendant got dressed, he was taken to the station and questioned. The interrogation began at 12:20 a.m. and ended at 3:13 a.m.

For in excess of two and a-half hours, defendant, who had signed a written waiver, denied any personal involvement in the crime. The first two and a-half hours of the interview were not taped and Remine subsequently destroyed his notes. When defendant finally admitted his involvement in the crime by implicating himself as the shooter, the officers asked to tape his statement and he agreed. The taped portion of the interview

began at 3:02 a.m. and ended at 3:13 a.m. According to Remine, defendant expressed no emotion during the interrogation and did not cry, but appeared a little tired.

The jury heard the taped confession (the Evidence Code section 402 hearing will be discussed later in this opinion) in which defendant confessed as follows: Defendant admitted he had signed a written waiver before discussing the crime with the officers. On the night in question, he went with some others, including "Ann" (Bonilla), in a van to Belmont Shore to "get some bicycles[.]" Defendant stayed in the van while "Skill and Cress got out and clipped the chain and took [a] bike" off a motorhome. (According to Remine's testimony, Cress is Victor Rodriguez and Skill is Eddie Gonzales.) Skill and Cress got back in the van with the stolen bike. As the van proceeded along Ocean, they saw Shadden riding his bicycle in the opposite direction. The van turned around and defendant and Cress got out and grabbed Shadden's bike from both sides. Shadden "got off, and he didn't say nothing. And then Cress said, 'Get the bike,' and then he went -- he went towards the bike to get it. And then [Shadden] looked at Cress and said, 'I'm going to kill you' and then started chasing Cress" on La Verne. After a few steps, Shadden turned around and started chasing defendant. Defendant stated: "And then I looked back, and he started to grab me, and then I realized that I had the gun in my pocket. [¶] Without thinking, I pulled it out and just shot underneath my arm just twice to scare him, but I ended up hitting him. But I didn't know that." Defendant ran and got back in the van.

On cross-examination of Remine, the defense brought out the circumstances surrounding the interrogation. Defendant was taken, without his parents, and placed in a small interview room about 6 by 12 feet. At 16, defendant was considerably younger and physically smaller than either Remine or Remine's partner, MacLyman, who were both in the interview room for the next three hours. Defendant was given no food, offered no rest break, and may or may not have been given any water.

The defense presented the expert testimony of Marcia Mills,

a clinical psychologist who specializes in forensic psychology. She testified she had administered an intelligence test to defendant and he had tested as low average on the verbal scale, and as middle average on the performance scale, with an "I.Q. of 90." She further testified that defendant's school achievement scores from 7th to 9th grades had steadily declined, with his October 1992 reading score placing him in the bottom five percent of 9th graders. On cross-examination, however, Mills admitted that defendant's low test scores did not eliminate his capacity to admit his crime, assuming he had committed one. Mills also conceded defendant had the mental capacity to understand the standard *Miranda*[4] warning given by the police.

In addition to Mills' testimony, defendant sought to introduce the testimony of attorney Arthur Close. Close would have testified to a telephone conversation he had with defendant immediately following the interrogation and confession. (At the Evidence Code section 402 hearing, Close testified that during the phone call, defendant "was in tears and highly agitated.") Defense counsel made an offer of proof that, "As I understood Art Close's testimony[, it] was that he received a call from [defendant] about four a.m. and that [defendant], at that time, said that he had given a false confession to a cop in order to make a phone call to Mr. Close in his capacity as a lawyer. I am offering it under [section] 1250 of the Evidence Code as a statement of the defendant's state of mind earlier when he made that statement." The trial court, who had heard Close testify at the Evidence Code section 402 hearing, excluded Close's testimony at trial.

ISSUES

Defendant contends: (I) his confession should have been suppressed; (II) Close's testimony should have been admitted at trial; (III) it was error not to instruct the jury to view his confession with caution; (IV) the jury should have been

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[4] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

instructed on premeditated murder, second degree murder, and voluntary manslaughter; (V) he should not have been convicted of felony murder based on the charged offense of malice murder; (VI) his sentence constitutes cruel and unusual punishment.

DISCUSSION

I

Defendant contends his waiver and confession were involuntary as a matter of law and that the admission of his confession violated the Fifth and Fourteenth Amendments as well as *Miranda* v. *Arizona* (1966) 384 U.S. 436. We conclude otherwise.

The trial court must determine, at a hearing conducted outside the jury's presence, whether the waiver and confession were voluntary and the *Miranda* requirements were met. The prosecution bears the burden of proving this by a preponderance of the evidence. (*People* v. *Markham* (1989) 49 Cal.3d 63, 67, fn. 3.) On appeal, the trial court's determination will be upheld if supported by a substantial evidence. (*People* v. *Salinas* (1982) 131 Cal.App.3d 925, 933.) "We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People* v. *Boyer* (1989) 48 Cal.3d 247, 263, disapproved on other grounds in *People* v. *Stansburg* (1995) 9 Cal. 4th 824, 830, fn. 1.)

In this case, defendant testified at the Evidence Code section 402 hearing that his repeated requests to call a lawyer and have his mother present during the interrogation had been denied. He claimed to have falsely confessed because it was the only way he could make a phone call. He testified that Officer MacLyman, who did not testify at the exclusionary hearing or

at trial, had repeatedly shoved diamond ring with the number "187" in his face, and drawn long and short lines to represent the prison sentences he would get depending upon whether he cooperated or not. Defendant also denied being in the van on the night in question or in the vicinity of Belmont Shore. He claimed to have just repeated the facts of the crime as told to him by the officers because he was tired, scared, and wanted to get out of the interrogation room. He explained that his taped acknowledgment of his written waiver was a lie, and that he simply had been given a piece of paper and told to sign it without being allowed to read it.

Officer Remine, on the other hand, testified to facts which, if believed, showed the waiver was knowingly and intelligently given and the confession was voluntary. Remine stated defendant had been advised of his rights, which he waived both orally and in writing. Remine did not recall whether defendant had asked to call an attorney, displayed any emotion, or cried during the untaped portion of the interview. He also did not recall MacLyman pointing the "187 ring" at defendant or drawing long and short lines on a piece of paper. He denied telling defendant it would go easier on him if he confessed and that he could not make any phone calls until he told the officers what they wanted to know.

Defendant's contrary testimony is not grounds for reversal. The trial court explicitly found Officer Remine, and not defendant, to be the credible witness, stating: "I am a fact finder first, and I have to decide and say who I believe. I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer R[e]mine and not the testimony of the defendant in this case. . . ." The evidence found credible by the trial court supports the determination that the waiver and confession were voluntary. (Evid. Code, § 411; *People* v. *Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds in *People* v. *Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, §§ 1750-1756, pp. 1704-1711.)

II

We conclude the trial court properly excluded Close's testimony at trial as inadmissible under the hearsay rule.

Defense counsel sought to introduce Close's testimony as circumstantial evidence of defendant's prior state of mind during the interrogation: "I am offering it under 1250 of the Evidence Code as a statement of the defendant's state of mind earlier when he made that statement. [¶] What I want the court to understand is -- what I am offering is that he told him he had made a false confession in order to call his lawyer, and that's an explanation of why it is he made that confession. And since 1250 allowed his state of mind, exception that allows a statement of intent or purpose, which I think that's what [defendant's] testimony in, pardon me, his statement to Mr. close was and because it goes to a pre-existing state of mind, I think that it is admissible, and I would make that offer."

Evidence Code section 1250, however, applies to the declarant's present mental state, as opposed to the declarant's mental state at a time prior to the statement. The statute provides: "(a) Subject to section 1252,[5] evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

By its terms, Evidence Code section 1250 is inapplicable to this case. Defendant telephoned Close after the interrogation

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[5] "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.)

was finished. His state of mind after the interrogation is not an issue in this case, nor does the evidence suggest there was a continuing mental state which carried over from the taped confession through the subsequent telephone call. On the contrary, we presume the taped confession was devoid of any obvious display of emotion, given defendant's failure to bring any such display to our attention in his appellate briefs or to the jury's attention below.

Given that Evidence Code section 1250 does not apply, the admissibility of Close's testimony depends upon whether it qualifies under the prior state of mind exception of Evidence Code section 1251. That provision states: "Subject to section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if: [¶] (a) The declarant is unavailable as a witness; and [¶] (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation."

The prior state of mind exception does not apply because defendant was not unavailable as a witness. The fact that he exercised his privilege against self-incrimination at the trial does not make him unavailable. "A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying." (Evid. Code, § 240, subd. (b).) "Thus, 'a party may not arrange a declarant's disappearance in order to use the declarant's out-of-court statement'; and if the statement is that of the party himself, he may not create 'unavailability' by invoking a privilege. [Citation.]" (1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 562, p. 537.)

Defendant contends the trial court improperly excluded Close's testimony as irrelevant and cites *Crane* v. *Kentucky*

(1986) 476 U.S. 683 in support of its admission. In *Crane*, the 16-year-old defendant had tried to introduce the testimony of police officers describing the length of the interrogation and the manner in which it was conducted. The trial court excluded the officers' testimony on the ground that the voluntariness of the defendant's confession had been resolved against him at the pretrial hearing, and the Kentucky Supreme Court affirmed. The United States Supreme Court reversed, holding the excluded evidence was relevant to the jury's determination on the credibility of the confession, an issue distinct from the voluntariness of the confession. "[E]vidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." (*Id.* at p. 688.)

Crane is distinguishable. In this case, defense counsel extensively cross-examined Remine concerning the manner in which the confession was secured. Factors including the size of the room, the length of the interrogation, the lack of food and rest, the late hour, the defendant's age and smaller size, and the absence of his parents and attorney were all brought out for the jury's evaluation. The exclusion of Close's testimony regarding a post-interrogation telephone conversation is not the equivalent of the exclusion of the officers' testimony in *Crane* regarding the manner in which the confession was obtained.

Defendant also contends Close's testimony was improperly excluded in violation of his right to due process under the Fourteenth Amendment. He maintains he was unfairly deprived of the constitutional right to present exculpatory evidence and that the state hearsay rule should give way to the federal constitution. For the reasons stated above, this was not an instance where a state rule of evidence unfairly abridged a defendant's constitutional right to due process. Close's excluded testimony regarding the post-interrogation conversation was not the sole evidence of what went on in the interrogation room. Remine's cross-examination testimony regarding the manner in which the interrogation was conducted and the taped confession itself provided the jury with the

evidence which defendant erroneously contends was missing at trial. Defendant's post-interrogation conversation with Close in which he described his prior state of mind was self-serving and "made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.)

We conclude the evidence was properly excluded as hearsay, the exceptions under Evidence Code section 1251 and 1252 do not apply, and defendant's constitutional rights were not violated.

III

Defendant contends it was error not to instruct the jury to view his confession with caution. We conclude otherwise.

The trial court considered and rejected the cautionary instruction after noting that during the unrecorded first two and a-half hours of the three-hour interrogation, defendant did not admit his guilt. When defendant finally confessed at the end of the two and half-hour period, his confession was recorded on an 11-minute tape and the interview was concluded.

Because the confession was taped, the trial court concluded the cautionary instruction was unnecessary and would be potentially confusing if given. The court stated in relevant part: "[T]hat cautionary instruction . . . shouldn't be given, perhaps because it would create a confusing situation for the jury. Why is it you look at it with caution, when there is an actual taped version of the statement, including an uncontested taped version. [¶] From the way I see the evidence in this case, and that statement given on tape was not different than anything testified to preliminarily, other than the fact that the other statements given first were denials, which weren't admissions or confessions. [¶] Finally, the defendant, according to the evidence, did confess, or [made] a number of admissions, which really totaled up to a confession. [¶] So, I think it would create confusion, rather than be helpful, even though the defense would like to have the statement, look at it with caution, and I don't think I should give an instruction if it is not applicable.

I don't believe it is applicable in this case. Most cases it would be. I don't think it is in this case. So I don't intend to give it."

The trial court was right. Because the untaped portion of the first two and a-half hours of the interview contained only denials (until defendant finally confessed at the end of that period and the recorder was turned on), there were no admissions made during the untaped interview which the jury should have been advised to view with caution. As for the incriminating portion of the interview, the jury had an uncontested recording of the confession so there was no need to warn the jury to view its accuracy with caution. (*People v. Hines* (1964) 61 Cal.2d 164, 173, overruled on other grounds by *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-75, fn. 40.)

IV

Defendant was charged with premeditated malice murder, but the jury was instructed only on felony murder. Defendant contends the jury should have been instructed on premeditated malice murder and its lesser included offenses of second degree murder and voluntary manslaughter. He maintains the failure to give those instructions exposed him to the possibility that the jury disbelieved his confession but nonetheless convicted him of first degree murder because it had no lesser options.

Defendant's theory rests on the fact that the information alleged only premeditated murder with malice aforethought, a violation of section 187, subdivision (a), and failed to allege that the murder occurred in the commission or attempted commission of a robbery or other felony as enumerated in section 189. Accordingly, defendant contends, given that felony murder under section 189 was not charged, he should not have been convicted on that theory and the failure to instruct on premeditated malice murder and its lesser included offenses was prejudicial error.

The information, however, alleged both the premeditated malice murder of William Shadden on May 31, 1993, and the second degree robbery of the same victim on the same date,

both with personal use of a firearm. In addition, the murder count expressly alleged that the murder was committed while the defendant was "engaged in the commission of the crime of Robbery, within the meaning of . . . section 190.2[subd.](a)(17)." Although the information did not mention section 189, the allegations were nevertheless sufficient to put defendant on notice that he was being charged with a murder that occurred during the commission of a robbery, or felony murder. Moreover, a defendant charged with malice murder may be convicted upon a theory of felony murder. It is not necessary that an information charging murder with malice must also expressly charge a felony murder under section 189. (*People v. Scott* (1991) 229 Cal.App.3d 707, 712-718.) There was no due process violation.

V

In a related contention, defendant asserts his felony murder conviction must be reversed because he was charged only with the separate crime of malice murder. He claims the conviction of the uncharged offense of felony murder deprived him of due process of law.

Citing *People v. Dillon* (1983) 34 Cal.3d 441, 465, defendant maintains that felony murder is a separate crime, distinct from malice murder, and not simply a devise by which the existence of malice is presumed from the commission of the underlying felony. He states: "Since appellant was charged only with malice murder -- specifically alleged under section 187 -- he was convicted of an offense not charged against him. Appellant was thereby deprived of due process . . . ."

We reject this assertion for the same reasons stated in part IV above and in *People v. Scott, supra*, 229 Cal.App.3d at pages 714-718. "Neither [section] 951 nor 952, specifying the form and matters that must appear in an information, contains a requirement that the statute which the accused is charged with violating be designated by number." (4 Witkin & Epstein, Cal. Crim. Procedure (2d ed. 1989) Proceedings Before Trial, §

2065, p. 2433.) Under section 952, it would have been sufficient to allege that defendant has murdered Shadden, without specifying the degree.[6] (*People v. Diaz* (1992) 3 Cal.4th 495, 556-557.)

VI

Citing *People v. Dillon, supra*, 34 Cal.3d 441, defendant contends his sentence constitutes cruel and unusual punishment.[7] Defendant points out he was only 16 years old at the time of the offense, had no prior convictions (but he had three verified prior arrests for trespassing, curfew violation, and graffiti writing, and a fourth disputed arrest for assault with a firearm), and had a limited intellectual capacity. He claims his family situation was bleak (he says he lived in a one bedroom apartment with an alcoholic and depressed welfare mother in a dangerous neighborhood, he never knew his father, he suffered

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[6] Section 952 provides: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

[7] "The basic test of a cruel or unusual punishment under *Dillon* is whether it is so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity. [Citation.] The main technique of analysis under *Dillon* is to examine the nature of the offense and the nature of the offender. [Citation.] (1) With respect to the nature of the offense, te court considers not only the offense in the abstract, but also the facts of the crime in the particular case, 'including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' [Citation.] (2) With respect to the nature of the particular person before the court, the question is whether the punishment is 'grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior ciminality, personal characteristics, and state of mind.' [Citation.]" (*People v. Mora* (1995) 39 Cal.App.4th 607, 614.)

from asthma), and his crime was "impulsive, amateurish, and ineffectual."

While it is true that defendant was only 16 and had no prior convictions, we strongly disagree with defendant's mild characterization of his crime. This was far more serious, sophisticated, and callous crime than the one in *Dillon*, which we distinguish. In *Dillon*, "an unusually immature 17-year-old with no prior criminal record became involved in a plan to steal growing marijuana from a field, and in a panic shot and killed a person who was guarding the field. He was guilty of first degree felony murder, but the trial court was reluctant to impose the statutory punishment of life imprisonment, which it considered extraordinarily harsh under the circumstances. The Supreme Court held that the statutory punishment violated the cruel or unusual punishment clause of the California Constitution in the particular circumstances, and that the offense could be reduced to second degree murder in order to prevent unconstitutional punishment." (*People v. Mora, supra*, 39 Cal.App.4th at pp. 613-614.)

This crime, on the other hand, involved a planned, physical confrontation with Shadden over a bicycle. It involved far greater risk of physical injury than would be inherent in stealing marijuana plants from a supposedly unoccupied field. Here, defendant was riding around in a van looking for bicycles to steal. When he spotted Shadden riding down the street, he got out of the van with the intention of ambushing him, forcing him off his bicycle, and robbing him. Defendant also carried a concealed handgun, which he pulled out and suddenly fired without warning when Shadden chased him. There was a much greater potential for violence in this case than in *Dillon*. We conclude that "the first *Dillon* factor, the nature of the offense including the way it was committed and the extent of defendant's involvement, does not compel reducing the statutory punishment as cruel or unusual." (*People v. Mora, supra*, 39 Cal.App.4th at p. 618.)

Defendant also contends the trial court abused its discretion by failing to impose the indeterminate term of 25 years to life,

which is the alternative sentencing choice provided in section 190.5, subdivision (b). That statute expressly states that the sentence to be imposed on a juvenile who was between 16 and 18 years of age at the time of the first degree murder with special circumstances shall be life without parole "or, at the discretion of the court, 25 years to life." (§190.5, subd. (b).) The record reflects that the trial court was fully aware of its sentencing choices and deliberately exercised its discretion after taking the matter under submission.

The trial court possesses broad discretion, limited by the bounds of reason. "By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just." (*Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195.)

Where, as here, a statute vests the trial judge with the discretionary power to decide the issue, "the appellate court will not substitute its own view as to the proper decision. '[T]he showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice.' [Citations.]" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 275, p. 286, quoting *Brown v. Newby* (1940) 39 Cal.App.2d 615, 618.)

In this case, the record contained several mitigating factors, argued by defense counsel below, including defendant's young age at the time of the crime and his lack of prior convictions. The record also contained, however, numerous aggravating factors. This crime was a senseless, random act of violence against a victim who happened to be riding his bicycle along the very street where defendant and his cohorts were trying to steal bicycles. Although defendant and his companions knew they could readily steal unattended bicycles, having only moments earlier successfully done so, they nevertheless decided to ambush Shadden and commit a strong-arm robbery. This criminal enterprise necessarily involved a high risk of physical injury and, given that defendant was armed with a concealed weapon, even death. Without warning Shadden that he was armed, defendant suddenly pulled out the concealed weapon and fired it under his arm while on the run, giving Shadden no chance to back off. The attack by ambush, the carrying of a concealed weapon, the random selection of the victim, and the senseless killing over a bicycle all demonstrated the extremely callous, brutal, and vicious nature of this crime. The trial court's selection of the harsher sentence was not an abuse of discretion.

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MASTERSON, J.

APPENDIX G

DIRECT EXAMINATION

BY MR. SCHMOCKER:

Q DETECTIVE REMINE, CAN YOU TELL ME, PLEASE, HOW YOU'RE REMPLOYED?

A POLICE OFFICER FOR THE CITY OF LONG BEACH, CURRENTLY ASSIGNED TO HOMICIDE DETAIL.

Q HOW LONG HAVE YOU BEEN SO ASSIGNED?

A A LITTLE OVER THREE YEARS.

Q NOW, TAKING YOU BACK TO LAST YEAR, AT SOME POINT IN TIME LAST YEAR, DID YOU BECOME THE INVESTIGATING OFFICER ON THE, IN THE CASE OF A KILLING OF ONE WILLIAM SHADDON?

A YES, SIR, I DID.

Q AND WHEN DID YOU, WHEN WERE YOU SO ASSIGNED?

A THE NIGHT THE INCIDENT OCCURRED.

Q NOW, AT SOME POINT IN TIME, DID YOU FIND CAUSE TO GO TO A RESIDENCE WHERE YOU BELIEVED YOU WOULD FIND ONE LEIF TAYLOR?

A YES, SIR.

Q WOULD THAT HAVE BEEN ON THE NIGHT OF SEPTEMBER FIRST, 1993?

A YES, SIR.

Q AND WHEN YOU WENT TO THAT LOCATION, YOU WENT THERE WITH A WARRANT; IS THAT CORRECT?

A YES, SIR.

Q AND THAT WAS A WARRANT BOTH TO SEARCH THE RESIDENCE AND TO ARREST MR. LEIF TAYLOR; IS THAT CORRECT?

A CORRECT.

Q WHEN YOU, YOU DID, IN FACT, GO PERSONALLY TO THAT ADDRESS; IS THAT CORRECT?

A YES, SIR.

Q WHEN YOU WENT THERE, DID YOU ALSO GO WITH A -- WITH A TEAM OF OFFICERS, IN ORDER TO EXECUTE THAT WARRANT?

A YES, SIR.

Q BESIDES YOURSELF, WAS THERE ANOTHER OFFICER ASSIGNED AS THE INVESTIGATING OFFICER?

A DETECTIVE MACLYMAN.

Q AND DID DETECTIVE MACLYMAN ALSO ACCOMPANY YOU TO THAT RESIDENCE?

A YES, SIR.

Q AND DID OTHER POLICE OFFICERS ALSO ACCOMPANY YOU?

A YES, SIR.

Q AND WERE THEY UNDER YOUR DIRECTION AND CONTROL?

A CORRECT.

Q HOW MANY OTHER OFFICERS, BESIDES DETECTIVE MACLYMAN AND YOURSELF, WERE THERE?

A MY RECOLLECTION, I THINK THERE WAS FOUR DETECTIVES TOTAL.

Q AND AN ENTRY OF THAT RESIDENCE WAS ACCOMPLISHED; IS THAT CORRECT?

A YES, SIR.

Q HOW WAS THAT ACCOMPLISHED?

A BY A KNOCK ON THE DOOR, AND SOMEONE ASKED WHO IT WAS. WE IDENTIFIED OURSELVES, AND THE DOOR WAS OPENED AT THAT POINT.

Q SO, SOMEONE FROM THE INSIDE OF THAT RESIDENCE OPENED THE DOOR?

A CORRECT.

Q AND WERE YOU ONE OF THE FIRST, WERE YOU THE FIRST OFFICER TO ENTER?

A NO, I WAS NOT.

Q DO YOU REMEMBER WHO DID?

A I THINK IT WAS DETECTIVE, ONE OF THE CAD PERSONNEL, DETECTIVE DUGAN OR NELSON. I DON'T RECALL EXACTLY WHO WAS THE FIRST ONE IN, THOUGH.

Q YOU WERE IN STREET CLOTHES; IS THAT CORRECT, SPORTS COAT?

A YES, SIR.

Q WHAT ABOUT THE OTHER DETECTIVES THAT WERE WITH YOU?

A DETECTIVE MACLYMAN AND MYSELF WERE DRESSED IN SUITS AND TIES, AND THE OTHER DETECTIVES WERE DRESSED IN PLAIN CLOTHES.

Q WHEN YOU OPENED THE DOOR, DID YOU DETERMINE -- WHO DID YOU FIND, ONE LEIF TAYLOR?

A YES, SIR.

Q WHERE DID YOU FIND HIM?

A HE WAS ON THE COUCH DIRECTLY TO THE LEFT OF THE FRONT DOOR. LYING ON THE COUCH, WOULD HAVE BEEN ON THE EAST WALL.

Q WAS HE FULLY DRESSED, OR WAS HE UNDRESSED?

A I DON'T RECALL. I THINK HE WAS PARTIALLY DRESSED. I THINK THEY COULD BE SLEEPING, YOU COULD TELL BY THE LOOKS ON THEIR FACE THEY WERE UP.

Q IF APPEARED, WHEN YOU ENTERED THEN, IT APPEARED THAT LEIF TAYLOR HAD BEEN ASLEEP; IS THAT CORRECT?

A YES, SIR.

Q WHAT TIME WAS IT THAT YOU MADE THAT ENTRY?

A 11:30 SOMEWHERE IN THE 11:30 P.M. AREA.

Q SOMETIME BETWEEN 11 AND 12, IS THAT FAIR TO SAY?

A YES, SIR.

Q AND THEN YOU IDENTIFIED MR. LEIF TAYLOR; IS THAT CORRECT?

A YES, SIR.

Q WHEN YOU DID THAT, AFTER YOU DID THAT, WHAT'S THE NEXT THING YOU DID WITH MR. TAYLOR?

A AT THE POINT, WE IDENTIFIED HIM AS THE PERSON IN THE HOUSE. WE CHECKED THE AREA IMMEDIATELY WHERE HE WAS SITTING. WE CHECKED HIM FOR ANY WEAPONS, AND HE WAS, AT THAT POINT HE WAS AT THAT POINT REMOVED FROM THE RESIDENCE.

Q AND HE WAS TAKEN INTO CUSTODY; IS THAT CORRECT?

A YES, SIR.

Q AND THEN WAS HE THEN TRANSPORTED TO LONG BEACH POLICE DEPARTMENT?

A YES, SIR.

Q HOW WAS HE TRANSPORTED?

A MYSELF AND DETECTIVE MACLYMAN.

Q DO YOU HAVE A SPECIFIC RECOLLECTION OF TRANSPORTING HIM YOURSELF?

A I AM ALMOST POSITIVE THAT'S WHAT HAPPENED, DUE TO THE FACT WE LEFT THE OTHER DETECTIVES THERE TO SEARCH AND THEN ANOTHER TEAM HAD ALSO COME OVER TO ASSIST IN THE SEARCH. WHY DON'T I -- IF YOU CAN LET ME REFER TO THE RECORD OF WHO TRANSPORTED, BECAUSE IT WOULD BE ON THE BOOKING SLIP.

Q IF YOU THINK IT WOULD HELP YOU IN YOUR RECOLLECTION, I WOULD ASK YOU TO DO THAT NOW.

A MY MISTAKE, DETECTIVE DUGAN TRANSPORTED HIM.

Q AND HOW LONG DID YOU STAY AT THAT RESIDENCE AFTER DETECTIVE DUGAN LEFT THE RESIDENCE?

A AS LONG AS, I DON'T RECALL THE EXACT TIME, 15, 20 MINUTES. BUT DETECTIVES COLETTE AND WREN WERE SEARCHING ANOTHER RESIDENCE, AND THEY CAME OVER TO CONTINUE THE SEARCH, AND ME AND MACLYMAN STAYED THERE UNTIL THEIR ARRIVAL, AND THEN WE IMMEDIATELY LEFT

TO GO TO THE STATION.

Q SO A RELATIVELY SHORT PERIOD OF TIME?

A YES, SIR.

Q DID --

AND THIS RESIDENCE THAT YOU WENT TO, CAN YOU TELL ME, IN DRIVING TIME, HOW LONG IT WOULD TAKE YOU TO DRIVE FROM THAT, HOW LONG IT TOOK YOU TO DRIVE FROM THAT RESIDENCE BACK TO THE POLICE DEPARTMENT?

A MAXIMUM OF 10 MINUTES.

Q AND DO YOU KNOW WHAT TIME YOU ARRIVED THEN, AT THE POLICE DEPARTMENT?

A NO, I DO NOT.

Q WOULD IT HAVE BEEN BEFORE OR AFTER MIDNIGHT, IF YOU KNOW?

A MIDNIGHT, SOUNDS APPROXIMATELY.

Q WHERE IS IT THAT YOU NEXT SAW LEIF TAYLOR?

A AT THE POLICE STATION, ON THE THIRD FLOOR, ADJACENT TO OUR OFFICE.

Q DO YOU KNOW, WAS MR. TAYLOR ADVISED OF HIS RIGHT TO REMAIN SILENT, AND HIS RIGHT TO HAVE A LAWYER WHILE HE WAS AT HIS RESIDENCE?

A NO.

Q DO YOU HAVE ANY KNOWLEDGE THAT HE WAS ADVISED BY DETECTIVE DUGAN IN THE POLICE CAR?

A NO, I DO NOT.

Q AND THE NEXT TIME THAT YOU SAW HIM WAS IN AN INTERVIEW ROOM ON THE -- IN AN INTERVIEW ROOM?

A YES, SIR.

Q SO WHEN YOU ARRIVED AT THE POLICE DEPARTMENT, DID YOU IMMEDIATELY GO UP TO THE THIRD FLOOR?

A WE IMMEDIATELY WENT TO THE FLOOR, PLACED OUR BRIEFCASES AT OUR OFFICE, GRABBED OUR NOTE PAD, AND GRABBED AN ADVISEMENT OF LEGAL RIGHTS FORM, AND IMMEDIATELY WENT TO BEGIN THE INTERVIEW.

Q AND BOTH YOU AND DETECTIVE MACLYMAN ENTERED THAT INTERVIEW ROOM TO CONDUCT AN INTERVIEW?

A YES, SIR.

Q WHEN YOU ARRIVED THEN, IN THAT INTERVIEW ROOM, DID MR. TAYLOR REQUEST TO SPEAK TO ANYONE?

A NO IMMEDIATELY, BUT WHEN WE WENT IN, NO, SIR.

Q DURING THIS, WOULD HAVE BEEN SHORTLY AFTER MIDNIGHT THAT YOU WENT IN; IS THAT

CORRECT?

A YES, SIR.

Q AND YOU ULTIMATELY TAPED AN INTERVIEW WITH MR. TAYLOR; IS THAT CORRECT?

A YES, SIR.

Q AND THAT INTERVIEW WAS TAPED, THE TAPE STARTED ABOUT THREE O'CLOCK IN THE MORNING; IS THAT CORRECT?

A AROUND 3:00 O'CLOCK YES, SIR.

Q AND IT FINISHED ABOUT 3:14?

A I DON'T RECALL THE EXACT TIME IT FINISHED, BUT --

Q BUT IT WASN'T A LONG INTERVIEW, WAS IT?

A CORRECT.

Q AND IT WAS BETWEEN, BETWEEN MIDNIGHT AND 3:00 O'CLOCK IN THE MORNING INTERVIEWS WERE CONDUCTED OF MR. TAYLOR; IS THAT CORRECT?

A YES, SIR.

Q AND YOU AND DETECTIVE MACLYMAN WERE INVOLVED IN THE CONDUCTING OF THOSE INTERVIEWS BETWEEN MIDNIGHT AND 3:00 O'CLOCK?

A YES, SIR.

Q WAS ANYONE BESIDES YOU AND DETECTIVE MACLYMAN INVOLVED IN THOSE, THAT INTERVIEW DURING BETWEEN MIDNIGHT AND THREE?

A NO, SIR.

Q DID YOU DETERMINE MR. TAYLOR'S AGE AT ANY POINT IN TIME BETWEEN MIDNIGHT AND THREE?

A I THINK WE ALREADY KNEW HIS AGE BECAUSE WE HAD OBTAINED AN INFORMATION OUT OF HIS JUVENILE PACKAGE, THAT TYPE OF THING.

Q AND DO YOU KNOW WHAT HIS AGE WAS ON SEPTEMBER FIRST, 1993?

A 16, I THINK.

Q AND YOU KNEW THAT ON THAT DAY?

A YES, SIR.

Q ON SEPTEMBER SECOND, I GUESS THE EARLY MORNING HOURS OF SEPTEMBER SECOND?

A CORRECT.

Q DID, WHEN YOU ENTERED INTO THE, INTO THE INTERVIEW ROOM, WAS MR. TAYLOR ALONE?

A I DON'T RECALL IF DETECTIVE DUGAN WAS STILL WITH HIM, OR THEY HAD PUT HIM IN THE ROOM AND CLOSED THE DOOR. I DON'T RECALL.

Q DID YOU HAVE ANY INFORMATION AS TO WHETHER OR NOT MR. TAYLOR HAD EVER BEEN

INTERROGATED BY THE POLICE BEFORE THIS DATE, THIS SEPTEMBER SECOND DATE?

A NO, I HAD NO INFORMATION OF THAT.

Q DURING THE PERIOD OF TIME THAT MR. TAYLOR WAS INTERROGATED, WAS AN ATTORNEY PRESENT?

A NO.

Q WAS, DURING THAT SAME PERIOD WHEN HE WAS INTERROGATED, WAS HIS PARENT PRESENT?

A NO.

Q FROM THE TIME THAT YOU FIRST SAW HIM ABOUT, PARDON ME, FROM THE TIME YOU ENTERED THE INTERVIEW ROOM UNTIL THE STATEMENT WAS TAKEN, DID MR. TAYLOR SLEEP?

A NO.

Q DID HE HAVE ANY FOOD?

A WE DIDN'T OFFER HIM ANY FOOD, NO.

Q DID HE HAVE ANY WATER?

A I AM SORRY.

Q DID HE HAVE ANY WATER?

A IT IS OUR HABIT TO USUALLY, YOU KNOW, SOMETHING OF THAT LENGTH, YOU KNOW, WE HAVE COKES IN OUR OFFICE, AND I DON'T RECALL IF WE GAVE HIM A COKE, BUT USUALLY WE ASK WHOEVER

WE INTERVIEW IF THEY WOULD LIKE SOMETHING TO DRINK.

Q THAT AS A MATTER OF CUSTOM YOU DO THAT?

A YES.

Q BUT YOU HAVE NO RECOLLECTION AS TO WHETHER YOU DID IT IN THIS CASE?

A THAT'S CORRECT.

Q AND DURING THIS PERIOD OF TIME, FROM 12 MIDNIGHT UNTIL SLIGHTLY AFTER 3:00 O'CLOCK, WERE BOTH YOU AND DETECTIVE MACLYMAN IN THE ROOM WITH MR. TAYLOR?

A ONE OF US AT ALL TIMES, UNTIL THE INTERVIEW WAS CONCLUDED, AND THEN I THINK WE WENT AND GOT THE BOOKING SHEETS AND FILLED THAT OUT. BUT THROUGHOUT THE WHOLE INTERVIEW, ONE OF US WAS WITH HIM AT ALL TIMES.

Q AT SOME PERIODS OF TIME, YOU WOULD LEAVE THE ROOM; IS THAT CORRECT?

A CORRECT. MYSELF OR DETECTIVE MACLYMAN BUT ONE OF US WOULD ALWAYS REMAIN THERE.

Q AND DURING, WOULD YOU SAY DURING THE BULK OF THE TIME THAT THIS INTERVIEW TOOK PLACE, WERE BOTH OF YOU PRESENT?

A YES, SIR.

Q AT ANY TIME BEFORE MR. TAYLOR MADE A TAPED STATEMENT DID HE SHOW ANY EMOTION?

A I DON'T RECALL IF HE DID OR NOT.

Q DO YOU RECALL WHETHER OR NOT, AT ANY POINT IN TIME DURING THIS INTERVIEW, HE WAS CRYING?

A NO, I DO NOT.

Q DURING --

IS IT FAIR TO SAY THAT MR. TAYLOR, AT SOME POINT IN TIME ASKED TO CALL AN ATTORNEY BY THE NAME OF ARTHUR CLOSE?

A I DON'T RECALL HIM MAKING THAT STATEMENT.

Q DO YOU KNOW WHETHER OR NOT HE WAS GIVEN, WHETHER HE WAS GIVEN AN OPPORTUNITY, AT ANY TIME DURING THE EARLY MORNING HOURS OF SEPTEMBER SECOND, TO MAKE A PHONE CALL?

A PRIOR TO US, WHEN WE ADVISED HIM OF HIS LEGAL RIGHTS, AND WE READ IT OFF THE FORM, AT THAT POINT, I MEAN, DURING THE ADVISEMENT, WHICH WOULD HAVE BEEN, HE WOULD HAVE HAD THE OPPORTUNITY THEN.

Q WAS HE PROVIDED A PHONE AT ANY PERIOD OF TIME DURING THE EARLY MORNING HOURS, THAT YOU ARE AWARE OF?

A NO, SIR.

Q NOW, DURING THE PERIOD OF TIME THAT HE WAS INTERVIEWED, HE GAVE SEVERAL DIFFERENT STATEMENTS; IS THAT CORRECT?

A YES, SIR.

Q DID HE GIVE THREE DIFFERENT STATEMENTS?

A TWO, I MEAN, IN MY OPINION IT IS TWO.

Q TWO THAT WERE SIGNIFICANTLY DIFFERENT IN THE FACTS THEY CONTAIN; IS THAT CORRECT?

A YES, SIR.

Q AND IT WAS THAT SECOND STATEMENT THAT YOU LATER MEMORIALIZED BY WAY OF A TAPE RECORDING; IS THAT CORRECT?

A YES, SIR.

Q NOW, AN ADVISEMENT OF LEGAL RIGHTS FORM WAS OBTAINED BY YOU BEFORE YOU ENTERED INTO THAT INTERVIEW ROOM; IS THAT CORRECT?

A I GOT IT OUT OF THE FILE CABINET, YES.

Q AND YOU BROUGHT THAT WITH YOU INTO THE INTERVIEW ROOM; IS THAT CORRECT?

A YES, SIR.

Q AND WHEN, WHEN IN THIS INTERROGATION PROCESS, PARDON ME, DID YOU SHOW THAT FORM TO LEIF TAYLOR?

A YES, SIR.

Q WHEN, DURING THIS PROCESS, DID YOU DO THAT?

A PRIOR TO THE INTERROGATION BEGINNING.

Q WHAT TIME WOULD THAT HAVE BEEN?

A I THINK IT WAS 12, 12:20 IN THE MORNING.

Q AND WHEN YOU -- DID YOU SHOW THIS DOCUMENT TO MR. TAYLOR?

A YES, SIR.

MR. SCHMOCKER: YOUR HONOR, I HAVE A DOCUMENT IT APPEARS TO BE A PHOTOCOPY, ENTITLED ADVISEMENT OF LEGAL RIGHTS THAT I OBTAINED FROM THE DISTRICT ATTORNEY'S OFFICE.

THE COURT: DEFENDANT'S A.

MR. SCHMOCKER: YES, PLEASE.

THE COURT: FOR THIS PROCEEDING ONLY, LET'S SAY DEFENDANT'S A.

MR. SCHMOCKER: A 402 OKAY VERY GOOD.

(DEFENSE EXHIBIT A MARKED FOR IDENTIFICATION.)

Q BY MR. SCHMOCKER: DETECTIVE, I AM SHOWING YOU A DOCUMENT, I WOULD LIKE TO SHOW YOU A DOCUMENT AND ASK YOU TO TAKE A LOOK AT IT AND SEE IF YOU, IF IT APPEARS TO BE A PHOTOCOPY OF SOMETHING YOU HAVE SEEN

BEFORE?

A YES, IT IS.

Q AND IS THAT THE DOCUMENT THAT YOU SHOWED TO LEIF TAYLOR?

A YES, SIR.

Q AND THERE APPEARS TO BE SOME HANDWRITING ON IT DOWN AT THE BOTTOM. DO YOU RECOGNIZE, OR DO YOU KNOW WHOSE HANDWRITING THAT IS?

A ON WHAT SPECIFIC LINE, SIR? THERE ARE FOUR DIFFERENT HANDWRITINGS DOWN HERE.

Q WELL, THERE IS A LINE THAT STARTS WITH THE TYPEWRITTEN WORDS, SIGNED, DID YOU SEE ANYONE PUT A SIGNATURE THERE?

A YES, SIR.

Q AND WHO WOULD THAT BE?

A THE DEFENDANT.

Q AND BELOW THAT, THERE IS A LINE THAT SAYS WITNESS. DO YOU SEE TWO DIFFERENT, WHAT APPEARS TO BE TWO SIGNATURES THERE?

A YES, SIR.

Q DO YOU KNOW HOW THOSE SIGNATURES GOT ON THAT DOCUMENT?

A MYSELF AND DETECTIVE MACLYMAN PUT OUR APPROPRIATE SIGNATURES ON THAT LINE.

Q NOW, WAS THAT DOCUMENT, HOW WAS THAT PRESENTED TO MR. TAYLOR? WAS IT SHOWN TO HIM, OR HOW IS IT THAT HIS SIGNATURE CAME TO BE ON THE DOCUMENT?

A WHEN WE SAT DOWN, AND WE TURNED IT AROUND, AND WE FACED IT TO HIM, AND HE WAS SITTING DIRECTLY ACROSS THE TABLE FROM US. AND WE TURNED IT AROUND, AND THEN WE READ EACH LINE TO HIM, AND THEN WE WOULD ALSO ASK HIM, "DO YOU WANT TO READ THIS YOURSELF" AND IF WE FEEL THAT NEED BE, WE WILL READ IT FOR HIM, AND ASK HIM IF HE UNDERSTANDS EACH LINE AS WE GO.

Q IN THIS CASE DID MR. TAYLOR READ IT TO HIMSELF, OR DID YOU READ IT TO HIM?

A I DON'T RECALL WHICH WAY IT WAS. I WILL SAY THAT WE TURNED AROUND, AND WE READ IT TO HIM. WE TURNED IT AROUND AND LET HIM READ IT, AND WE READ IT TO HIM WHILE HE WAS READING IT TO HIMSELF.

Q AND DO YOU HAVE A SPECIFIC RECOLLECTION OF DOING THAT?

A NO, SIR I DO NOT.

Q BUT YOU DO RECALL HIM PUTTING HIS SIGNATURE AT THE BOTTOM?

A YES, SIR.

Q NOW, AT ANY TIME, WELL – BEFORE THAT DOCUMENT WAS SIGNED BY MR. TAYLOR, MR. TAYLOR ASKS TO SPEAK TO A LAWYER?

A NO, SIR.

Q AT ANY TIME AFTER THAT DOCUMENT WAS SIGNED, DID MR. TAYLOR ASK TO SPEAK TO A LAWYER?

A NOT TO MY RECOLLECTION, HE DID NOT.

Q DID HE EVER ASK SPECIFICALLY TO SPEAK TO A LAWYER BY THE NAME OF ARTHUR CLOSE?

A I DON'T RECALL HIM SAYING THAT, NO, SIR.

Q DURING THE PERIOD OF TIME BEFORE THAT DOCUMENT WAS SIGNED, DID MR. TAYLOR EVER ASK TO SPEAK TO HIS MOTHER?

A NO, SIR.

Q AT ANY TIME AFTER THAT DOCUMENT WAS SIGNED, DID HE ASK TO SPEAK TO HIS MOTHER?

A NO, SIR NOT TO MY RECOLLECTION.

Q NOW, DETECTIVE, DO YOU OWN A RING THAT HAS THE NUMERALS 187 ON IT?

A THAT'S MY PARTNER.

Q YOUR PARTNER HAS A RING THAT HAS THOSE NUMBERS ON IT?

A HE HAS A GOLD RING THAT HAS 187 ON IT YES, SIR.

Q AND DURING THE COURSE OF THE INTERVIEW OF MR. TAYLOR, WAS THAT RING PRESENTED TO HIM AND SHOWN TO HIM?

A I DON'T RECALL IF IT WAS OR NOT.

Q DO YOU RECALL WHETHER MR. TAYLOR EVER ASKED WHY HE WAS BEING INTERVIEWED?

A HE DID ASK WHAT, HE MADE A STATEMENT, "IS THIS BAD?" TO US, WE SAID "YES, IT IS."

Q AND WAS THAT AT THE BEGINNING OF THE INTERVIEW?

A YES, THAT WAS AT THE BEGINNING, PRIOR TO THE ADVISEMENT.

Q AND AT THAT POINT IN TIME, DID YOUR PARTNER PRESENT TO HIM HIS HAND, IN SUCH A WAY THAT THE RING, 187 RING, COULD BE SEEN?

A HE COULD HAVE BEEN HOLDING HIS HAND THAT WAY. I MEAN, TO WHERE THE DEFENDANT COULD READ IT, BUT I DON'T RECALL HIM POINTING IT AT HIM LIKE THAT.

Q YOU HAVE NO RECOLLECTION OF DETECTIVE MACLYMAN IN RESPONSE TO MR. TAYLOR'S QUESTION OR STATEMENT, "IS THIS BAD?" PRESENTING HIS FIST TOWARDS HIM SO THAT HE COULD READ WHAT WAS ON THE RING?

A NO, SIR.

Q AFTER MR. TAYLOR MADE THE FIRST STATEMENT HE MADE IN REGARDS TO THE, IN REGARDS TO THE EVENTS OF MEMORIAL DAY, 1993, WELL -- IF I MAY WITHDRAW THAT QUESTION.

BEFORE HE MADE THAT FIRST STATEMENT, DID ANYONE, I MEAN, DID EITHER YOU OR YOUR PARTNER DRAW TWO LINES ON A PAD OF PAPER?

A PRIOR TO WHAT, SIR?

Q HIM MAKING ANY STATEMENT IN REGARDS TO THE EVENTS OF MEMORIAL DAY 1993?

A NO, NOT TO MY KNOWLEDGE. I DON'T UNDERSTAND THE QUESTION A WHOLE BUNCH I DON'T.

Q WELL, DID YOU, YOU HAD A PAD OF PAPER IN ORDER TO TAKE NOTES IN THE INTERVIEW ROOM; IS THAT CORRECT?

A YES, SIR.

Q AT SOME POINT IN TIME, DURING THIS INTERVIEW BETWEEN MIDNIGHT AND 3:00 O'CLOCK IN THE MORNING, DID YOU DRAW ONE SHORT LINE ON A PIECE OF PAPER AND ONE LONG LINE ON A PIECE OF PAPER?

A NOT TO MY RECOLLECTION, I DON'T --WE JUST TOOK OUR NOTES.

Q WELL, DID YOU SEE YOUR PARTNER DRAW ONE SHORT LINE AND ONE LONG LINE ON A PIECE OF PAPER?

MAYBE IF I COULD MAKE IT A COMPOUNDED QUESTION, AND WITHOUT OBJECTION, AND SAY THAT THERE ARE TWO WAYS TO GO, A SHORT WAY, AND A LONG WAY IN REGARDS TO THIS INTERVIEW?

A I DON'T RECALL THAT BEING --IT COULD HAVE BEEN DONE. I DON'T RECALL DOING IT, MY PARTNER DOING IT.

THE COURT: BRIEF INTERRUPTION.

ATTORNEY CLOSE, YOU MIGHT WANT TO TALK TO HIM AND TELL HIM, COORDINATE WITH HIM. HE WILL KNOW LIKELY WHEN YOU ARE TO BE FINISHED WITH THIS OFFICER, OR HAVE HIM COME UP. HE COULD WAIT AROUND A LITTLE BIT.

(DISCUSSION OFF THE RECORD)

Q BY MR. SCHMOCKER: DURING THE COURSE OF THIS INTERVIEW, DID YOU TELL, DID YOU TELL MR. TAYLOR THAT, MR. TAYLOR, THAT YOU BELIEVE THAT HE DID NOT INTENT TO KILL THE VICTIM?

A I DON'T RECALL MAKING THAT STATEMENT, NO.

Q IN REGARDS TO, I PREVIOUSLY ASKED YOU ABOUT DRAWING A SHORT LINE AND A LONG LINE, IN REGARDS TO THAT, AND THE QUESTION I WOULD PUT TO YOU IS THIS, DID YOU DRAW A SHORT LINE AND SAY THAT IF YOU TOOK THIS ROUTE YOU WOULD GET OUT OF JAIL BY THE TIME YOU WERE 25?

A NO, I DID NOT.

Q DURING THE COURSE OF THIS INTERVIEW, WERE YOU DRINKING COFFEE?

A DUE TO THE TIME OF MORNING IT WAS, I PROBABLY WAS SIR, YES.

Q WAS YOUR PARTNER, TO YOUR KNOWLEDGE, DRINKING COFFEE?

A HE DOES NOT DRINK COFFEE.

Q DID YOU SEE HIM DRINKING ANYTHING IN THE COURSE OF THAT INTERVIEW?

A NO, I DON'T RECALL IF HE WAS OR NOT.

Q AND IS IT YOUR TESTIMONY THAT, PRIOR TO THE TIME THAT THIS TAPED STATEMENT WAS MADE, THAT MR. TAYLOR NEVER REQUESTED TO USE A TELEPHONE?

A NOT TO MY RECOMMENDATION HE DID NOT, NO.

Q DURING THE COURSE OF THIS INTERVIEW, DID YOU EVER TELL MR. TAYLOR THAT YOU HAD ALREADY CONTACTED HIS MOTHER?

A I DON'T RECALL IF THAT WAS SAID OR NOT.

Q DO YOU KNOW WHETHER OR NOT MR. TAYLOR MADE A SERIES OF PHONE CALLS AT APPROXIMATELY FOUR O'CLOCK IN THE MORNING?

A IF THE DEFENDANT MADE ANY PHONE CALLS, IT WOULD HAVE BEEN AFTER THE INTERVIEW, AND I DON'T RECALL IF HE DID OR NOT.

Q ALMOST FINISHED DETECTIVE. LET ME JUST HAVE A MOMENT AND SEE WHERE I STAND.

DURING THE COURSE OF THIS INTERVIEW, FROM MIDNIGHT TO A LITTLE AFTER THREE, DID YOU EVER TELL MR. TAYLOR THAT HE WASN'T GOING TO GO ANYWHERE OR MAKE ANY PHONE CALLS UNTIL HE TOLD YOU WHAT YOU WANTED TO KNOW?

A NO, SIR.

Q DID YOU EVER TELL HIM THAT IT WOULD GO EASIER ON HIM IF HE CONFESSED?

A NO, SIR.

MR. SCHMOCKER: NO FURTHER QUESTIONS.

THE COURT: CROSS-EXAMINATION.

CROSS-EXAMINATION.

BY MR. LAMB:

Q DETECTIVE REMINE, AT ANY TIME DURING THIS INTERVIEW, DID YOU THREATEN MR. TAYLOR IN ANY WAY?

A NO, SIR.

Q DID YOU MAKE ANY PROMISES TO HIM.

A NO, SIR.

Q REFERRING TO WHAT WE BELIEVE HAS BEEN MARKED AS DEFENSE A, THE ADVISEMENT, LEGAL RIGHTS?

A YES, SIR.

Q AT THE TIME THAT YOU PRESENTED THAT TO MR. TAYLOR, DID YOU ADVISE HIM OF HIS RIGHTS?

A I THINK DETECTIVE MACLYMAN IS THE ONE THAT WAS GOING OVER THE ADVISEMENT WITH HIM.

Q BUT I WANT TO MAKE SURE IT IS CLEAR, IN ADDITION TO HAVING THE RIGHTS PRESENTED TO HIM IN WRITTEN FORM, WERE THEY VERBALLY GIVEN TO HIM?

A YES, SIR.

Q AND AT THAT TIME, DID HE WAIVE HIS RIGHT TO AN ATTORNEY?

A YES.

Q DID HE WAIVE HIS RIGHT TO HAVE ONE PRESENT?

A YES.

Q DID HE TELL YOU HE UNDERSTOOD HIS RIGHTS.

A YES, HE DID.

Q DID YOU EXPLAIN TO HIM THEY WOULD BE USED AGAINST HIM IN A COURT OF LAW?

A YES.

Q HE HAD A RIGHT TO REMAIN SILENT?

A CORRECT.

Q IN ADDITION TO SIGNING THE FORM, WHICH APPEARS HE SIGNED "YES" WITH HIS INITIALS. UNDER QUESTION FIVE, I UNDERSTAND EACH OF THESE RIGHTS EXPLAINED TO ME; IS THAT CORRECT?

A YES, SIR.

Q SIGNING HIS NAME AT THE BOTTOM; IS THAT CORRECT?

A YES, SIR.

Q DID HE ALSO TELL YOU THAT HE WAIVED THESE RIGHTS?

A YES, SIR.

Q AND THAT HE WISHED TO SPEAK TO YOU?

A YES.

Q THEN WAS THERE YET ANOTHER TIME WHEN YOU ADVISED HIM?

A YES, THERE WAS.

Q WHEN WAS THAT?

A ON THE TAPE-RECORDED INTERVIEW, BEFORE WE TAPED THE INTERVIEW, WE WENT OVER THE ADVISEMENT OF LEGAL RIGHTS FORM ON TAPE ALSO.

Q SO WAS THERE THE FIRST PART OF THE

INTERVIEW THAT WAS NOT TAPE-RECORDED?

A YES.

Q AND THEN THERE IS A REVIEW-TYPE INTERVIEW THAT IS TAPE RECORDED?

A YES, SIR.

Q DO YOU HAVE THAT TAPE WITH YOU TODAY?

A YES, I DO.

Q I WOULD ASK TO HAVE THAT TAPE MARKED AS PEOPLE'S 1.

THE COURT: FOR THIS 402 HEARING IT IS NO. 1.

(PEOPLE'S 1 MARKED FOR IDENTIFICATION)

Q BY MR. LAMB: CAN YOU PLAY THE PORTION OF THE TAPE THAT HAS THE ADVISEMENT OF RIGHTS ON IT?

A YES.

MR. LAMB: IF YOU WOULD AS SOON AS THERE IS A VOICE, IDENTIFY THE VOICES FOR US.

(ATTORNEY PLAYS PEOPLE'S 1)

MR. LAMB: TURN THE TAPE OFF, PLEASE.
NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ANYTHING ELSE, MR. SCHMOCKER?

MR. SCHMOCKER: NOTHING ELSE YOUR HONOR,

THANK YOU.

THE COURT: YOU ARE FREE TO TAKE YOUR SEAT, OFFICER.

MR. SCHMOCKER: YOUR HONOR, I ASK MR. TAYLOR TO TAKE THE STAND.

THE COURT: SIR, COME BE SWORN.

APPENDIX H

APPENDIX H

§ 2254. State custody; remedies in Federal courts

****

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –.

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual

> determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

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(2)

NOV 1 0 2004

No. 04-162

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-162

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR

REPLY BRIEF FOR PETITIONER

In this habeas corpus case, the Ninth Circuit Court of Appeals expressly declined to apply the 28 U.S.C. § 2254(e)(1) presumption of correctness for State-court factual findings. Then, without holding a federal evidentiary hearing, the Ninth Circuit re-weighed the evidence in the State record and rejected State-court fact and credibility findings that had been rationally based on the testimony of witnesses whose demeanor had been observed by the State trial judge. The Ninth Circuit erred in both respects, and its errors warrant the grant of certiorari.

1. As justification for its refusal to apply the AEDPA-strengthened § 2254(e)(1) presumption, the Ninth Circuit anomalously invoked the separate § 2254(d)(2) provision that, as also adopted in AEDPA, was meant to afford greater rather than lesser protection for State-court criminal judgments attacked in federal proceedings. Further, in employing (d)(2) to avoid the (e)(1) presumption, the Ninth Circuit in effect read back into habeas corpus law the kinds of prerequisites to the operation of (e)(1) that Congress abandoned in its AEDPA reform of the earlier statutory presumption.

The Ninth Circuit's interpretation of (d)(2) as trumping (e)(1) raises an important question of habeas corpus law, departs from this Court's own treatment of and pronouncements on the relationship between (d)(2) and (e)(1), see *Wiggins* v. *Smith*, 539 U.S. 519, 528, 529, 530 (2003); *Miller-el* v. *Cockrell*, 537 U.S. 322, 340, 341-342, 348 (2003), and creates a conflict on the question within the circuit courts of appeals, cf. *Valdez* v. *Cockrell*, 274 F.3d 941 (CA5 2001), cert. denied, 537 U.S. 883 (2002). Most recently, since the filing of the State's petition, the Third Circuit Court of Appeals in *Lambert* v. *Blackwell*, Nos. 03-2282, 03-2283, 2004 WL 2283277, at *18 (CA3 Oct. 12, 2004), has also noted the uncertainty of habeas corpus law in this area.

Taylor's brief in opposition points to nothing that detracts from the "certworthiness" of the question of whether (d)(2) may trump (e)(1). He argues, primarily, that the Ninth Circuit's interpretation and application of (d)(2) and (e)(1) were simply correct. (Opp. 1-3.) But he does not deny that the relationship between § 2254(d)(2) and (e)(1) presents an important question of habeas corpus law. Nor does he come to grips with this Court's teaching, in *Miller-el* v. *Cockrell* and *Wiggins* v. *Smith*, that (d)(2) and (e)(1) represent separate hurdles for the petitioner to overcome. His discussion of *Miller-el* (Opp. 1-2) ignores the fact that, contrary to what this Court said there, the Ninth Circuit here specifically held that, where the federal court satisfies itself that the State-court adjudication does not pass muster under (d)(2), the federal court need not apply the (e)(1) presumption at all. (Pet. App. A9-A10, A25-A26.) Taylor's additional argument notwithstanding (Opp. 1-2), the fact that the Ninth Circuit ultimately purported to find "clear and convincing" evidence that assertedly might have overcome the (e)(1) presumption changes nothing. Not only does that erroneous ruling itself warrant certiorari review (see p. 4, *post*), but it does not diminish the damaging effect of the Circuit's clear holding that the (e)(1) presumption was rendered inapplicable by virtue of (d)(2) in the first place.

Nor does Taylor refute the existence of a conflict between the Ninth Circuit's holding and that of the Fifth Circuit in *Valdez* v. *Cockrell*, 274 F.3d 941. He offers merely the unremarkable proposition that, under AEDPA and *Valdez*, a State-court factual determination might be invalid under (e)(1) without also requiring rejection of the State-court's ultimate adjudication of the federal claim under (d)(2). (Opp. 2-3.) But he ignores what is most pertinent here: the *Valdez* decision's rejection of the notion, central to the Ninth Circuit's decision in this case, that (d)(2) now places in the path of the operation of (e)(1) the same kinds of obstacles that the AEDPA repealed in the course of strengthening the statutory presumption of correctness for State-court fact findings. (Pet. App. A10-A11.)

2. Even if § 2254(d)(2) could trump (e)(1), review still should be granted because the Ninth Circuit, in deeming the State court's ruling to be the product of a (d)(2) "unreasonable determination of the facts," also flouted this Court's prior decision in *Early* v. *Packer*, 537 U.S. 3 (2002) (*per curiam*).[1/] In *Packer*, this Court rejected the Ninth Circuit's view that a State adjudication becomes "unreasonable" under § 2254 unless it contains an explicit statement that the State court considered particular items of evidence. See 537 U.S. at 9. In the case at bar, however, the Ninth Circuit repeated its *Packer* mistake. It once again condemned a State-court adjudication as "unreasonable," not "in light of the evidence presented in the State proceeding" as required under (d)(2), but in the end because the State trial and appellate courts in explaining their rulings did not "mention" certain evidence that, as it turned out

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1. As recounted in the State's certiorari petition, *Packer* is but one of an unusually long line of cases in which this Court has been constrained to correct Ninth Circuit failures to afford State-court judgments the enhanced deference due to them since the passage of AEDPA in 1996. (Pet. 15.) The State, in this regard, further notes the pendency before this Court of two other certiorari petitions raising issues very similar to ones in this case: *Mueller* v. *Nunes*, No. 03-1452, and *Collins* v. *Rice*, No. 04-52.

a few years later, the federal panel believed to be significant. (Pet. App. A10-A26.) The Ninth Circuit's decision, grudging rather than deferential toward the State court, contravenes this Court's holding in *Packer*.

Taylor retorts that *Packer* dealt with § 2254(d)(1) rather than (d)(2). (Opp. 4-5.) But he nowhere even suggests why omitting to "mention" certain evidence might somehow render a State-court determination "unreasonable" under (d)(2) if the exact same omission would not render a State-court ruling "unreasonable" under closely-related (d)(1). In light of *Packer's* recognition that State courts need not make a "formulary statement" detailing the evidence it has considered, see 537 U.S. at 9, the Ninth Circuit's decision on this point warrants review in any event.

3. Certiorari is justified, further, to review and correct the Ninth Circuit's intrusive re-determination of State-court fact findings. In rejecting the State judge's fact findings and his determinations of the credibility of witnesses whose plausible testimony he personally observed—and instead making witness-credibility and other fact findings to the contrary on the basis of the "cold" State-court written record without any proper federal evidentiary hearing—the Ninth Circuit usurped the role of the State courts in the federal habeas corpus system as recognized in cases such as *Marshall* v. *Longberger*, 459 U.S. 422, 434 (1982), *Maggio* v. *Fulford*, 462 U.S. 111, 113 (1963), and *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (*per curiam*).

Addressing this ground for certiorari, Taylor's brief (Opp. 5) cites the observation in *Miller-el* v. *Cockrell*—acknowledged in the State's petition (Pet. 12)—that a State court's credibility determinations sometimes might be overcome even under AEDPA. 537 U.S. at 340. But, as the State has argued (Pet. 12-13), rejection of such findings might occur in the rare or extreme case, but not in a case in which a witness observed by and deemed credible by the State judge gives plausible testimony that provides rational support for the State court's factual findings, and the federal court merely re-weighs the

evidence in the "cold" State-court transcript to draw opposite witness-credibility conclusions. That is what happened here.

Finally, Taylor erroneously asserts that the State is not contesting the correctness of the Ninth Circuit's credibility determinations. (Opp. 5.) For whatever role it might play in this Court's consideration of the State's certiorari petition, the State indeed asserts that the Ninth Circuit's findings were wrong. The State's certiorari petition in fact asserted both that the Ninth Circuit's constructions of § 2254(d) and (e) were erroneous, and that "[u]nder the proper version of the facts, as found by the State court, Taylor's *Miranda* and involuntary-confession claims were failures." (Pet. 8, 14.)

CONCLUSION

For these reasons, petitioner Maddox respectfully requests that the Court grant a writ of certiorari in this case.

Dated: November 10, 2004

Respectfully submitted,

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